TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 363

32 CASES, MORE OR LESS, EACH CONTAINING SIX JARS OF JAM, ASSORTED FLAVORS, NET WT. 5 LBS., 3 OZ., SHIPPED BY THE PURE FOOD MANUFACTURING CO., DENVER, COLORADO, AND PURE FOOD MANUFACTURING COMPANY, CLAIMANT, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 16, 1950.

CERTIORARI GRANTED NOVEMBER 27, 1950.

United States Court of Appeals

TENTH CIRCUIT.

No. 4039.

UNITED STATES OF AMERICA, APPELLANT,

vs.

62 CASES, MORE OR LESS, EACH CONTAINING SIX JARS OF JAM, ASSORTED FLAVORS, NET WT. 5 LBS. 2 OZS., SHIPPED BY THE PURE FOOD MANUFACTURING COMPANY, DENVER, COLORADO, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO.

FILED JANUARY 16, 1950.

INDEX.

Proceedings in the United States Court of Appeals.

Pleas and progeedings in the United States Court of Appeals for the Tenth Circuit, at the May Term, 1950, of said Court, before Honorable Orie L. Phillips, Chief Judge, and Honorable Walter A. Huxman and Honorable John C. Pickett, Circuit Judges.

On the 16th day of January, A. D. 1950, a transcript of the record, pursuant to notice of appeal, filed in the United States District Court for the District of New Mexico, was filed in the office of the clerk of the United States Court of Appeals for the Tenth Circuit, in a certain cause wherein United States of America was appellant, and 62 Cases, more or less, each containing six jars of jam, assorted flavors, net wt. 5 lbs. 2 ozs., shipped by the Pure Food Manufacturing Company, Denver, Colorado, was appellee, which said transcript, as prepared and printed under the rules of the United States Court of Appeals for the Tenth Circuit, is in the words and figures following:

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 4039.

UNITED STATES OF AMERICA, APPELLANT,

vs.

SIXTY-TWO CASES, MORE OR LESS, CONTAINING SIX JARS OF JAM, etc., APPELLEE.

Statement of Points.

The United States of America, Appellant, makes the following statement of points to be relied upon.

(1) The District Court erred in not condemning the article under seizure as misbranded in interstate commerce within the meaning of Section 403 (g) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 343 (g)).

(2) The District Court erred in concluding that the article under seizure did not purport to be and was not represented as fruit jam.

(3) The District Court erred in determining that the labeling of the article under seizure was the controlling factor in determining whether the article was misbranded under Section 403 (g) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 343 (g)) inasmuch as labeling is only one of many factors to be taken into consideration under such section.

(4) The District Court erred in refusing to hold that the definitions of misbranding contained in Sections 403 (g) and 403 (c) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 343 (g) and 21 U.S.C. 343 (c)) stand independent of each other, and in holding that, since the article under

seizure was labeled "imitation" under Section 403 (c), if was not misbranded under Section 403 (g).

UNITED STATES OF AMERICA, Appellant,
By: EVERETT M. GRANTHAM,
United States Attorney.
ALBERT H. CLANCY,
Assistant U. S. Attorney.

[Proof of Service attached to original.]

Filed United States Court of Appeals, Tenth Circuit, January 26, 1950. Robert B. Cartwright, Clerk.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO.

PLEAS AND PROCEEDINGS BEFORE THE HONORABLE CARL A. HATCH, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF NEW MEXICO, PRESIDING IN THE FOLLOWING ENTITLED CAUSE:

UNITED STATES OF AMERICA, LIBELLANT,

vs.

62 CASES, MORE OR LESS, EACH CONTAINING SIX JARS OF JAM, ASSORTED FLAVORS, NET WT. 5 LBS. 2 OZS., SHIPPED BY THE PURE FOOD MANUFACTURING COMPANY, DENVER, COLORADO, LIBELLEE.

No. 1464.—Civil.

Libel of Information.

To the Honorable Colin Neblett, Judge of the United States District Court for the District of New Mexico.

1 Comes now the United States of America by Albert H. Clancy, Assistant U. S. Attorney for the District of New Mexico, and shows unto the Court:

I.

That this libel is filed by the United States of America in its own right and prays the seizure, for condemnation, of a certain article of food, as hereinafter set forth, in accordance with the Federal Food, Drugs and Cosmetic Act (21 U.S.C. 301 et seq.).

II.

2 That the Pure Food Manufacturing Company, Denver, Colorado, shipped in interstate commerce from Denver, Colorado, to Charles Ilfeld Company, Raton, N. M., via truck of Charles Ilfeld Company, on or about January, 1949, an article of food consisting of 62 Cases, more or less,

each containing six jars of jam, assorted flavors, the individual jars being labeled in part: "Net Wt. 5 lbs. 2 Oz. Delicious Brand Imitation Grape Jam"; "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Strawberry Jam"; "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Apricot Jam"; "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Plum Jam"; "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Peach Jam"; "Net Wt. 5 Lb. 2 Oz. Delicious Brand Imitation Blackberry Jam".

III.

The aforesaid articles are foods within the meaning of the Federal Food, Drug, and Cosmetic Act, and were misbranded when introduced into and while in interstate commerce and while held for sale after shipment in interstate commerce, within the meaning of said Act, 21 U.S.C. 343 (g) (1) in that they purport to be and are represented as fruit jams (graps, strawberry, apricot, plum, peach or blackberry), foods for which definitions and standards of identity have been prescribed by regulations promulgated pursuant to 21 U.S.C. 341 and they fail to conform to such definitions and standards since paragraph 29.0(a) of such definitions and standards specifies that fruit jams (grape, strawberry, apricot, plum, peach, or blackberry) are made from a mixture composed of not less than 45 parts by weight of the fruit ingredient (grape, strawberry, apricot, plum, peach, or blackberry) to each 55 parts by weight of one of the optional saccharine ingredients specified in such definitions and standards, and that such mixture is concentrated by heat to such point that the soluble solids content of the finished jam is not less than 68 per cent for grape, strawberry and blackberry, and not less than 65 per cent for apricot, peach and plum, as determined by the methods in such regulations prescribed, whereas, the articles were made from a mixture composed of less than 45 parts by weight of the fruit ingredient (grape, strawberry, apricot, plum, peach, or blackberry) to each 55 parts by weight of one of the optional saccharine ingredients specified in such definition and standard, and the soluble solids con-

tent of the articles (grape, strawberry, and blackberry) is less than 68 percent, and the soluble solids content of the articles (apricot, peach, and plum) is less than 65 percent, as determined by the methods prescribed in such definitions and standards.

IV.

That the aforesaid articles are in the possession of Charles Ilfeld Company at Raton, New Mexico, or elsewhere within the jurisdiction of this Court.

V.

That by reason of the foregoing the aforesaid articles are held illegally within the jurisdiction of this Court, and are liable to seizure and condemnation pursuant to the provisions of said Act, 21 U.S.C., 334.

Wherefore, Libellant prays that process in due form of law according to the course of this Court in cases of Admiralty jurisdiction issue against the aforesaid articles; that all persons having any interest therein be cited to appear herein and answer the aforesaid premises; that this Court decree the condemnation of the aforesaid articles and grant libellant the costs of this proceeding against the claimant of the aforesaid articles; that the aforesaid articles be disposed of as this Court may direct, pursuant to the provisions of said act; and that said libellant have such other and further relief as to the Court may seem meet and proper.

ALBERT H. CLANCY,
Assistant U. S. Attorney.

4 United States of America, District of New Mexico, County of Santa Fe, ss:

Albert H. Clancy, of lawful age, being first duly sworn, on oath deposes and states that he is an Assistant U. S. Attorney for the District of New Mexico, and makes this affidavit for and on behalf of the United States of America, Libellant herein; that D. P. Willis, Assistant General Counsel, Federal Security Agency, Washington, D. C., re-

ported to this affiant the violation of the Act of Congress set up and described in the foregoing libel; that affiant has read the said libel and knows the contents thereof, and that the same is true to the best of his knowledge and belief and according to the information furnished him by the said D. P. Willis, of the Federal Security Agency.

ALBERT H. CLANCY,
Assistant U. S. Attorney.

Subscribed and Sworn to before me this 9th day of March, A. D., 1949.

FRANCES LUCERO,
Deputy Clerk, U. S. District Court, District
(Seal) of New Mexico.

Filed March 11, 1949.

Order.

5 This cause coming on to be heard this 11th day of March, 1949, upon the motion of the United States of America, by Albert H. Clancy, Assistant U. S. Attorney, for the District of New Mexico, praying that the usual process and monition of this Court do issue in this behalf.

Now, the Court being fully advised in the premises, doth grant the said motion.

It Is Therefore Ordered, Adjudged and Decreed by the Court that the Clerk of this Court forthwith issue a warrant of seizure in due form of law, directed to the United States Marshal for the District of New Mexico, commanding him:

1st. To arrest all and singular the property effects described in said Libel of Information, and now stored with the Charles Ilfeld Company, at Raton, N. M.; that is to say, 62 Cases, more or less, each containing six jars of jam, assorted flavors, Net Wt. 5 Lbs. 2 Ozs., shipped by the Pure Food Manufacturing Company, Denver, Colorado, the

individual jars being labeled in part: "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Grape Jam"; "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Strawberry Jam"; "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Apricot Jam"; "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Plum Jam"; "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Peach Jam"; "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Blackberry Jam".

2nd. To post a written notice on the bulletin board at the entrance to the U. S. Post Office at Raton, New Mexico, directing that all persons claiming the said property, or knowing or having anything to say why the same should not be seized and condemned, to appear, plead and show cause, if any they have, before this Court on or before the 11th day of April, 1949, why the said 62 Cases, more or less, each containing six jars of jam, assorted flavors, Net
6 Wt. 5 Lbs. 2 Ozs. shipped by the Pure Foods Manufacturing Company, Denver, Colorado, the individual jars being labeled in part: "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Grape Jam"; "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Strawberry Jam"; "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Apricot Jam"; "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Plum Jam"; "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Peach Jam"; "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Blackberry Jam", should not be seized and condemned as prayed for in said libel, and that this matter be, and the same is hereby set down for hearing before this Court at Santa Fe, New Mexico, at ten o'clock a. m., on the 11th day of April, 1949.

3rd. To publish the said notice in the Raton Daily Range, a newspaper published daily at Raton, New Mexico, in two issues thereof, the last publication being not less than fourteen days before the 11th day of April, 1949.

4th. To serve a copy of said warrant of seizure on the Charles Ilfeld Company, at Raton, New Mexico.

Dated: Santa Fe, New Mexico, this 11th day of March, A. D. 1949.

COLIN NEBLETT,
United States District Judge.

Filed March 11, 1949.

Warrant of Seizure.

The President of the United States of America,

To the Marshal of the United States, for the District of New Mexico, Greeting:

Whereas, a libel of information has this day been filed in the above entitled proceeding, and the Court, upon consideration thereof, having entered its order directing that a warrant of seizure issue in due form of law, returnable at Santa Fe, New Mexico, in said District on April 11th, 1949;

Now, Therefore, You Are Hereby Commanded and Directed:

1. That you arrest and seize all and singular the property and effects described in said libel and now in the possession of Charles Ilfeld Company at Raton, New Mexico, to-wit: (62 cases, more or less, each containing six jars of jam, assorted flavors, net wt. 5 lbs. 2 ozs., shipped by the Pure Food Manufacturing Company, Denver, Colorado,)

2. That you post in writing on the bulletin board at the entrance of the U. S. Post Office at Raton, New Mexico, a notice directing the said claimant and all persons claiming the said described property, or knowing or having anything to say why the same should not be condemned and forfeited, to be and appear before this Court at Santa Fe, in said District, at 10:00 o'clock on the 11th day of April 1949, then and there to show cause, if any they have, why the said property should not be condemned and forfeited as prayed in said libel;

3. That you publish said notice in the Raton Daily Range, a daily newspaper published in Raton, in said District, in two consecutive issues thereof, the last publication to be not less than fourteen days before the said 11th day of April, 1949, and,

4. That you serve a copy of said warrant of seizure upon the said Charles Ilfeld Company at Raton, New Mexico, together with a copy of said libel.

8 And of your acts and doings hereunder that you make due return to this office, as the law directs.

Witness the Honorable Colin Neblett, Judge of the District Court of the United States for the District of New Mexico, assigned, and the seal thereof, at Santa Fe, in said District, this 11th day of March, 1949.

WM. D. BRYARS, Clerk,
By FRANCES L. LUCERO,
(Seal) Deputy Clerk.

Marshal's Return.

Received the within Warrant of Seizure, March 18, 1949 and on the 19th day of March, 1949, I executed same by seizing 23 Cases of the with.... named assorted jam etc., at the Charles Ilfeld Company warehouse in Raton, New Mexico, I did on the same day hand to Mr. Kenneth Kearney, Assistant Manager of said ware-house, a copy of the within Warrant of Seizure together with a copy of Order and Libel of Information attached, I also posted Notice of Libel on the bulletin board in the U. S. Post Office in Raton, New Mexico, on the same day I handed Notice of Libel for publication to the Editor of the Raton Daily Range, a daily newspaper, namely: James Barber, at Raton, New Mexico. The said 23 cases etc., of

assorted jams being left at the Charles Ilfeld Company warehouse until further order of the court.

FELIPE SANCHEZ Y BACA,
United States Marshal,
By J. FRANK TRUJILLO, Deputy.

Marshal's Fees

Service	$ 2.00
Expense	27.71
Total	$29.71

Filed March 23, 1949.

Motion for Removal to United States District Court for the District of Colorado.

9 Comes Now claimant, Pure Food Manufacturing Company, by its attorneys, Wilson & Whitehouse, Ireland and Ireland and Benjamin F. Stapleton, Jr., and states to this Honorable Court as follows:

There is pending in the United States District Court for the District of New Mexico a libel for condemnation proceedings under Section 334 of Chapter 21 of U.S.C.A. based upon alleged misbranding by the claimant Pure Food Manufacturing Company.

The number of libel for condemnation proceedings is limited to this action undertaken in the United States District Court for the District of New Mexico, and

All witnesses on behalf of the claimant are located in Denver, Colorado, and the goods seized by order of this Court were manufactured in Denver, Colorado, and claimant's principal place of business is in Denver, Colorado.

Now, Therefore, claimant, by its attorneys, moves this Honorable Court to remove this cause for trial to the United

States District Court for the District of Colorado, pursuant to Section 334 of Chapter 21 of U.S.C.A.

WILSON & WHITEHOUSE,
By JOSEPH G. WHITEHOUSE,
Albuquerque, New Mexico;
IRELAND AND IRELAND,
By BENJAMIN F. STAPLETON, JR.,
Attorneys for Pure Food Manufacturing Company, claimant.

Address of Claimant: 2420 Seventeenth Street, Denver, Colorado.

Filed April 18, 1949.

Order of Continuance.

This cause coming on to be heard this 18th day of April, 1949, and it appearing to the Court that the United States Attorney for the District of New Mexico, and Wilson & Whitehouse, Ireland & Ireland, and Benjamin F. Stapleton, Jr., attorneys for claimant, have failed to agree on the removal of this proceeding to the United States District Court for the District of Colorado, pursuant to Section 334 of Chapter 21 of U.S.C.A.;

It Is, Therefore, Ordered that the hearing scheduled for April 11, 1949 be continued to May 9, 1949, at which time the Court will hear oral arguments on the Motion for Removal of this libel proceeding to the United States District Court for the District of Colorado.

Dated at Albuquerque, New Mexico, this 18th day of April, 1949.

CARL A. HATCH,
United States District Judge.

Filed April 18, 1949.

Order Overruling Motion for Removal to United States District Court for District of Colorado.

This cause coming on to be heard this 12th day of May, 1949, upon the motion of claimant and Libellee, for removal to Denver, Colorado, plaintiff appearing by Albert H. Clancy, an assistant United States Attorney, the defendant appearing by Benjamin F. Stapleton, Jr., the Court having considered said motion, and having listened to arguments of counsel:

11 It Is Therefore Ordered, Adjudged and Decreed that said motion be and the same hereby is overruled.

CARL A. HATCH,
U. S. District Judge.

Filed May 12, 1949.

Answer of Pure Food Manufacturing Company.

Comes now Pure Food Manufacturing Company of Denver, Colorado, by its attorneys, Ireland and Ireland and Benjamin F. Stapleton, Jr. of Denver, Colorado, and Fred E. Wilson and Joseph G. Whitehouse of Albuquerque, New Mexico, and for answer to libellant's libel of information, answers and defends as follows:

First Defense.

The libel of information fails to state a claim against libellee and claimant upon which relief can be granted.

Second Defense.

Claimant admits the allegations contained in paragraph II of the libel of information; admits as alleged in paragraph III that the articles seized were "food" within the meaning of the Federal Food, Drug, and Cosmetic Act; that said articles were made from a mixture of less than 45 parts by weight of the fruit ingredient (grape, strawberry, apricot, plum, peach, or blackberry) to each 55 parts by weight of optional saccharine ingredients, and the soluble solids content

of the articles (grape, strawberry, and blackberry) is
12 less than 68 percent, and the soluble solids content of the articles (apricot, peach, and plum) is less than 65 percent; denies each and every other allegation contained in paragraph III of the libel of information; denies each and every allegation of paragraph V of the libel of information; alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph IV of the libel of information.

Third Defense.

Claimant has manufactured for a period of more than fifteen years imitation jams similar and in many instances identical to the articles seized under order of Court dated March 11, 1949; such "imitation jams" were manufactured by claimant in accordance with the provision of the Federal Food and Drug Acts of 1906 and 1938. The Congress of the United States ratified the manufacture and sale in Interstate Commerce of "imitation jams" and other "imitation" foods when it passed the Federal Food, Drug, and Cosmetic Act of 1938, which provided in part as follows:

"Section 343 Misbranded Food

A food shall be deemed to be misbranded—(c) If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word "imitation" and immediately thereafter the name of the food imitated." Section 343 (c), Title 21, U.S.C.A.

That the Congress of the United States, in passing the Federal Food, Drug, and Cosmetic Act of 1938, and particularly Section 343 (c) of Title 21 of U.S.C.A., did not intend to prohibit the sale and shipment of imitation foods, all as exemplified by the Reports and Hearings of the 73rd, 74th, and 75th Congress and other documents and sources, is clear and unequivocal. Pursuant to the provision of Section 343 (c) of Title 21 of U.S.C.A., Congress specifically intended the manufacture and shipment in Interstate Commerce of imitation jams and other "imitation" foods such as the

13 articles seized in this proceeding; the imitation jams manufactured by the claimant and seized under order of this Court dated March 11, 1949 were manufactured, labeled, and shipped in Interstate Commerce in strict compliance with the Federal Food, Drug, and Cosmetic Act of 1938.

Wherefore, claimant having fully answered, prays that libellant's libel of information be held for naught, that the United States Marshal for the District of New Mexico be ordered and directed to release and return to the custody of the claimant all articles seized under the order of Court dated March 11, 1949, court costs and fees, and storage, and other expenses incurred as a result of this improper seizure to be paid by libellant.

IRELAND AND IRELAND,
BENJAMIN F. STAPLETON, JR.,
FRED E. WILSON, JGW,
JOSEPH G. WHITEHOUSE,
Attorneys for Claimant.

Address of Claimant: 2420 Seventeenth Street, Denver, Colorado.

Filed May 19, 1949.

Claimant's Requested Findings of Fact and Conclusions of Law.

47 This cause coming on to be heard this ..... day of August, 1949 before The Hon. Judge Carl A. Hatch, United States District Judge for the District of New Mexico at Albuquerque, New Mexico, and The Hon. Albert H. Clancy, Assistant United States Attorney for the District of New Mexico, and The Hon. Leonard Hardy of Washington, D. C., appearing on behalf of the United States of America, Libellant, and Ireland and Ireland and Benjamin F. Stapleton, Jr., of Denver, Colorado, and Fred E. Wilson and Joseph G. Whitehouse of Albuquerque, New Mexico, appearing on behalf of Pure Food Manufacturing Company, Claimant herein, and the Court having considered the sev-

eral stipulations made and entered into between counsel for the libellant and claimant, and also the arguments of counsel and the Court now being fully advised in the premises, the Court doth make the following Findings of Fact and Conclusions of Law:

Findings of Fact.

1. This action was filed by the United States of America for the seizure and condemnation of an article of food consisting of 62 cases, more or less, each containing six jars of an article of food, assorted flavors, the individual jars being severally labeled in part as follows: "Net wt. 5 lbs. 2 oz. Delicious Brand Imitation Grape Jam"; "Net wt. 5 lbs. 2 oz. Delicious Brand Imitation Strawberry Jam"; "Net wt. 5 lbs. 2 oz. Delicious Brand Imitation Apricot Jam"; "Net wt. 5 lbs. 2 oz. Delicious Brand Imitation Plum Jam"; "Net wt. 5 lbs. 2 oz. Delicious Brand Imitation Peach Jam"; "Net wt. 5 lbs. 2 oz. Delicious Brand Imitation Blackberry Jam";

2. that the Pure Food Manufacturing Company of Denver, Colorado manufactured said articles of food and shipped the same in interstate commerce from Denver, Colorado, to Charles Ilfeld Company of Raton, New Mexico, by truck of Charles Ilfeld Company on or about January 15, 1949;

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3. that said articles were in the possession of Charles Ilfeld Company at Raton, New Mexico, which is within the jurisdiction of this Court, when seized by the U. S. Marshal for the District of New Mexico, pursuant to order issued March 11, 1949 in response to libel of information filed with the U. S. District Court at Albuquerque, New Mexico;

4. that said articles seized by the United States Marshal were "food" within the meaning of the Federal Food, Drug and Cosmetic Act of 1938;

5. that said articles seized have food value and are wholesome and are in every way fit for human consumption;

6. that the Federal Security Administrator has promulgated definitions and standards for fruit preserves and jellies, which definitions and standards of identity were published all as set forth in section 29 of Service Regulatory Announcements, Food, Drug and Cosmetic No. 2, Rev. 1, dated December 28, 1948;

7. that said Federal Security Administrator has not promulgated definitions and standards of identity for imitation fruit preserves and jellies;

8. that said claimant, Pure Food Manufacturing Company, has manufactured and marketed products similar to the articles seized, through the ordinary and usual channels of trade, for at least a period of fifteen years prior to the commencement of this action;

9. that the good faith of the Pure Food Manufacturing Company, claimant, in the manufacturing and marketing of products similar to the ones seized herein, is not challenged in this proceeding;

10. that said product in question was and is generally sold by wholesale dealers to retail markets and grocery stores and resold to the consuming public, and that to such purchasers the product bore the label identical with the label of the article seized;

11. that retailers advertise jams, preserves and jellies for sale and in filling telephone orders for same from housewives or other consumers, do frequently fill such orders with imitation jams and jellies similar to the product seized in this action and that such product bore the imitation label as hereinbefore set forth;

12. that the contents of the products seized are identical with that stated on the label with the possible qualification that the 20% pectin as stated on the label may more accurately be described as a 20% pectin solution;

13. that the imitation jams and jellies so manufactured by claimant, Pure Food Manufacturing Company, and simi-

lar to the items seized in this action, are sold to the consuming public substantially lower priced than the genuine fruit products, manufactured in accordance with standards fixed as aforesaid;

14. that a majority of the 5 lb. 2 oz. containers of imitation jam are sold and consumed by large families in lieu of butter or butter substitutes;

15. that the articles of food in question do not comply with the definition and standard of identity for fruit preserves and jams and do not purport and are not represented to so comply with such standards;

16. that the article of food seized purport to be and are represented as imitation fruit preserves and purport to be nothing else and are represented as nothing else;

17. that the articles of food seized are sold in interstate commerce without deception;

18. that products similar to those seized were sold to various wholesalers and retailers within the State of New Mexico, and that some of the same products were later resold to hotels, restaurants, ranches and logging camps within the State of New Mexico; that at least on one menu in a hotel in the State of New Mexico the menu carried the words "Jellies or preserves served with above orders"; that patrons of the hotel requesting such jellies or preserves were served a product similar and identical to the product seized in this proceeding, without disclosure by the hotel to patron that the article was an imitation jelly or preserve; and the patron had no opportunity of seeing or observing the label or knowing that he was eating and actually consuming an imitation product;

19. that some imitation jellies and preserves have been served by some ranches and logging camps and to employees thereof; and that such employees ate and consumed such products without being informed that the same were imitation products and without an opportunity to see or observe the label on the container.

Conclusions of Law.

1. The articles seized in the instant action are not misbranded under the Federal Food, Drug and Cosmetic Law of 1938.

2. The articles seized are imitations of pure food preserves and as such are sanctioned in interstate commerce under section 343C of Title 21 U.S.C.

3. The labels on the seized articles conform in all respects with the requirements of Section 343C, Title 21, U.S.C.

4. From the evidence adduced, the claimant is manufacturing and selling an article of food which is an imitation of a real article, namely fruit preserves and jellies, and purports to be nothing else.

5. The product seized does not purport to be nor is it represented as pure fruit preserves and jellies.

——————Insert #1, 2, 3 & 4

Since the articles seized are not misbranded, the Government's action therefore cannot be maintained, and the
51 articles of food seized under the decree or seizure dated March 11, 1949, must be restored to the claimant.

Done in Open Court this ..... day of August, 1949.

.....

United States District Judge.

Filed September 23, 1949.

Plaintiff's Requested Findings of Fact and Conclusions of Law.

Refused Except as otherwise given.

That the article of food involved in this case, and labeled in part "imitation jam", was so presented and represented to many consumers that to them it purported to be the food

"jam", for which definitions and standards of identity have been duly promulgated.

Refused.

That where consumers are supplied with a food that has the appearance and taste of, and is eaten for, a food for which there is a legal standard of identity, and such consumers have no opportunity to observe the label of the food consumed by them, such food purports to be to them the standardized food regardless of any declaration contained on the label as to the identity of the food consumed.

Refused.

That a food purports to be a food for which definitions and standards of identity have been established, where such food simulates the color, taste, and appearance of,
52 and is used in place of and in substitution for, such standardized food.

#1.

That the primary purpose of the Federal Food, Drug, and Cosmetic Act is to protect the consuming public, the ultimate consumer.

2.

That the Federal Food, Drug, and Cosmetic Act is not intended primarily to protect the ultimate purchaser as distinguished from the ultimate consumer.

3.

That the word "purport" as used in section 403 (g) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 343 (g)] should be construed to have its usual ordinary meaning.

4.

That where newspaper advertisements, menus in public eating places, and employers' private dining halls offer for sale or consumption a food which simulates a standardized food, without disclosing that such article is not the standard-

ized food, such simulating food is represented to the consuming public as the standardized food.

20.

That the article of food here involved has the appearance of grape jam, strawberry jam, blackberry jam, apricot jam, peach jam, and plum jam for which definitions and standards of identity have been established.

21.

That the food here involved is made to taste like and does taste like grape jam, strawberry jam, blackberry jam, apricot jam, peach jam, and plum jam for which definitions and standards of identity have been established.

22.

53 That the food which is the subject of this proceeding is used by the consumer in place of, and as a substitution for, the fruit jams grape, strawberry, blackberry, apricot, peach, and plum for which definitions and standards of identity have been established.

That the only manner in which consumers can readily distinguish the various "imitation" fruit jams under seizure from the standardized fruit jams is by reference to the label on the individual containers which states that the article is an "imitation jam".

Denied.

Filed September 23, 1949.

Court's Findings of Fact and Conclusions of Law.

This cause coming on to be heard this 9th day of August, 1949, before the Honorable Judge Carl A. Hatch, United States District Judge for the District of New Mexico at Albuquerque, New Mexico, and the Honorable Albert H. Clancy, Assistant United States Attorney for the District of New Mexico, and the Honorable Leonard Hardy of Wash-

ington, D. C., appearing on behalf of the United States of America, Libellant, and Ireland and Ireland and Benjamin F. Stapleton, Jr., of Denver, Colorado, and Fred E. Wilson and Joseph G. Whitehouse of Albuquerque, New Mexico, appearing on behalf of Pure Food Manufacturing Company, Claimant herein, and the Court having considered the several stipulations made and entered into between counsel for the libellant and claimant, and also the arguments of counsel and the Court now being fully advised in the premises, the Court doth make the following Findings of Fact and Conclusions of Law:

Findings of Fact.

54 1. This action was filed by the United States of America for the seizure and condemnation of an article of food consisting of 62 cases, more or less, each containing six jars of an article of food, assorted flavors, the individual jars being severally labeled in part as follows: "Net wt. 5 lbs. 2 oz. Delicious Brand Imitation Grape Jam"; "Net wt. 5 lbs. 2 oz. Delicious Brand Imitation Strawberry Jam"; "Net wt. 5 lbs. 2 oz. Delicious Brand Imitation Apricot Jam"; "Net wt. 5 lbs. 2 oz. Delicious Brand Imitation Plum Jam"; "Net wt. 5 lbs. 2 oz. Delicious Brand Imitation Peach Jam"; "Net wt. 5 lbs. 2 oz. Delicious Brand Imitation Blackberry Jam".

2. That the Pure Food Manufacturing Company of Denver, Colorado, manufactured said articles of food and shipped the same in interstate commerce from Denver, Colorado, to Charles Ilfeld Company of Raton, New Mexico, by truck of Charles Ilfeld Company on or about January 15, 1949.

3. That said articles were in the possession of Charles Ilfeld Company at Raton, New Mexico, which is within the jurisdiction of this Court, when seized by the U. S. Marshal for the District of New Mexico, pursuant to order issued March 11, 1949, in response to libel of information filed with the U. S. District Court at Albuquerque, New Mexico.

4. That said articles seized by the United States Marshal

were "food" within the meaning of the Federal Food, Drug and Cosmetic Act of 1938.

5. That said articles seized have food value and are wholesome and are in every way fit for human consumption.

6. That the Federal Security Administrator has promulgated definitions and standards for fruit preserves and jellies, which definitions and standards of identity were published all as set forth in section 29 of Service Regulatory Announcements, Food, Drug and Cosmetic No. 2, Rev. 1, dated December 28, 1948.

55 7. That said Federal Security Administrator has not promulgated definitions and standards of identity for imitation fruit preserves and jellies.

8. That said claimant, Pure Food Manufacturing Company, has manufactured and marketed products similar to the articles seized, through the ordinary and usual channels of trades, for at least a period of fifteen years prior to the commencement of this action.

9. That the good faith of the Pure Food Manufacturing Company, claimant, in the manufacturing and marketing of products similar to the ones seized herein, is not challenged in this proceeding.

10. That said product in question was and is generally sold by wholesale dealers to retail markets and grocery stores and resold to the consuming public, and that to such purchasers the product bore the label identical with the label of the article seized.

11. That retailers advertise jams, preserves and jellies for sale and in filling telephone orders for same from housewives or other consumers, do frequently fill such orders with imitations jams and jellies similar to the product seized in this action and that such product bore the imitation label as hereinbefore set forth.

12. That the contents of the products seized are identical with that stated on the label with the possible qualification

that the twenty per cent pectin as stated on the label may more accurately be described as a twenty per cent pectin solution.

56 13. That the imitation jams and jellies so manufactured by claimant, Pure Food Manufacturing Company, and similar to the items seized in this action, are sold to the consuming public substantially lower priced than the genuine fruit products, manufactured in accordance with standards fixed as aforesaid.

14. That a majority of the 5 lb. 2 oz. containers of imitation jam are sold and consumed by large families in lieu of butter or butter substitutes.

15. That the articles of food in question do not comply with the definition and standard of identity for fruit preserves and jams and do not purport and are not represented to so comply with such standards.

16. That the articles of food seized purport to be and are represented as imitation fruit presrves and purport to be nothing else and are represented as nothing else.

17. That the articles of food seized are sold in interstate commerce without deception.

18. That products similar to those seized were sold to various wholesalers and retailers within the State of New Mexico, and that some of the same products were later resold to hotels, restaurants, ranches and logging camps within the State of New Mexico; that at least on one menu in a hotel in the State of New Mexico the menu carried the words "Jellies or preserves served with above orders"; that patrons of the hotel requesting such jellies or preserves were served a product similar and identical to the product seized in this proceeding, without disclosure by the hotel to patron that the article was an imitation jelly or preserve; and the patron had no opportunity of seeing or observing the label or knowing that he was eating and actually consuming an imitation product.

57 19. That some imitation jellies and preserves have been served by some ranches and logging camps and to employees thereof; and that such employees ate and consumed such products without being informed that the same were imitation products and without an opportunity to see or observe the label on the container.

20. That the article of food here involved has the appearance of grape jam, strawberry jam, blackberry jam, apricot jam, peach jam, and plum jam for which definitions and standards of identity have been established.

21. That the food here involved is made to taste like and does taste like grape jam, strawberry jam, blackberry jam, apricot jam, peach jam, and plum jam for which definitions and standards of identity have been established.

22. That the food which is the subject of this proceeding is used by the consumer in place of, and as a substitution for, the fruit jams grape, strawberry, blackberry, apricot, peach, and plum for which definitions and standards of identity have been established.

Conclusions of Law.

1. The articles seized in the instant action are not misbranded under the Federal Food, Drug and Cosmetic Law of 1938.

2. The articles seized are imitations of pure food preserves and as such are sanctioned in interstate commerce under section 343 e of Title 21 U.S.C.

3. The labels on the seized articles conform in all respects with the requirements of Section 343 e, Title 21 U.S.C.

4. From the evidence adduced, the claimant is manufacturing and selling an article of food which is an imitation of a real article, namely, fruit reserves and jellies, and purports to be nothing else.

58 5. The product seized does not purport to be nor is it represented as pure fruit preserves and jellies.

6. That the primary purpose of the Federal Food, Drug, and Cosmetic Act is to protect the consuming public, the ultimate consumer.

7. That the Federal Food, Drug, and Cosmetic Act is not intended primarily to protect the ultimate purchaser as distinguished from the ultimate consumer.

8. That the word "purport" as used in Section 403 g of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 343 g) should be construed to have its usual ordinary meaning.

9. That where menus in public eating places, and employer's private dining halls offer for sale or consumption a food which simulates a standardized food, without disclosing that such article is not the standardized food, such simulated food is represented to such patrons, guests and employees, as the standardized food.

Since the articles seized are not misbranded, the government's action therefore cannot be maintained, and the articles of food seized under the decree of seizure dated March 11, 1949, must be restored to the claimant.

Done at Albuquerque, New Mexico, this 13th day of September, 1949, A. D.

CARL A. HATCH,
United States District Judge.

Filed September 14, 1949.

Opinion of the Court.

59 The facts in this case are not in serious dispute. Practically all the findings made are based upon the agreements of counsel.

Briefly, it may be stated that the article of food in question is an imitation jam. Jam is an article of food for which definitions and standards have been established.

The question involved is mainly one of law. The government asserts that an article of food for which definitions and standards have been established cannot lawfully be imitated and sold as an imitation of such article of food, even though such imitation is properly labeled as an imitation. The contentions of the government are based upon Section 343(g), Title 21 United States Code Annotated. This interpretation of sub-section (g) completely ignores sub-section (c). The statute reads in part as follows:

Section 343. Misbranded Food. A food shall be deemed to be misbranded . . . .

Imitation of Another Food.

(c) If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word "imitation" and immediately thereafter, the name of the food imitated.

It will be observed that sub-section (c) contains no exception of an article of food for which definitions and standards have been established. It plainly and clearly states an article to be misbranded "if it is an imitation of another food." The product in question is an imitation of another food. It does not pretend to be anything else. Sub-section (c) continues, "unless its label bears, in type of uniform size and prominence, the word 'imitation' and immediately thereafter, the name of the food imitated." Again, the article involved meets this as well as every other requirement of this sub-section. The language is unequivocal, without exceptions, and is not obscured in doubt or ambiguity, unless there is read into it language and meaning not now therein contained.

60 Any person reading sub-section (c) and even in connection with sub-section (g) would reasonably come to the conclusion that if the imitation of another food has a label bearing, in type of uniform size and prominence, the word "imitation" and immediately thereafter the name of the food imitated, such food so labeled would not be mis-

branded. Acting under such apparent, reasonable interpretation of the language of sub-section (c), the manufacturer has made and sold this article for years without any intent to violate the law. Claimant has sought to comply fully with every command of the statute. It is unnecessary to say that citizens have the right to rely upon the laws of the land as they are written and as reasonably interpreted. They should not be subjected to the hazards of administrative or judicial interpretation, extending restrictions of the law far beyond the plain meaning of the language used.

If the law-making branch of government desires this particular statute to be given the construction for which the government contends, it would be a simpler matter to insert in sub-section (c) an exception as to food for which definitions and standards have been established. No such appropriate language indicating the legislative intention to make it impossible to imitate an article of food for which definitions and standards have been established, appears in sub-section (c).

If sub-section (c) is to be amended to prevent imitation of an article of food for which definitions and standards have been established, the same should be done by legislative action in clear language easily read and understood by citizens, such as the claimant in this action, who seek only to know the mandates of the statute in order that they may comply with the same. Such an extension of language should never be made by administrative action or judicial construction.

61 Appropriate orders dismissing the libel and ordering the restoration of the articles seized may be prepared and entered.

CARL A. HATCH,
United States District Judge.

Filed September 14, 1949.

Judgment and Decree.

This Cause coming down to be heard this 9th day of August, 1949, before the Hon. Judge Carl A. Hatch, United States District Judge for the District of New Mexico at Albuquerque, New Mexico, and the Hon. Albert H. Clancy, Assistant United States Attorney for the District of New Mexico and the Hon. Leonard Hardy of Washington, D. C. appearing on behalf of the United States of America, Libellant, and Ireland and Ireland and Benjamin F. Stapleton, Jr., of Denver, Colorado, and Fred E. Wilson and Joseph G. Whitehouse of Albuquerque, New Mexico, appearing on behalf of Pure Food Manufacturing Company, claimant herein, and the Court having considered the evidence stipulated by libellant and claimant, the oral arguments of said parties, and the written brief filed on behalf of the Government, and the Court having made findings of fact and conclusions of law,

Now Therefore the Court being fully advised, it is Ordered, Adjudged, and Decreed, that the libel of information of the United States of America in this action, be, and the same hereby is, dismissed, and that judgment be granted in favor of claimant, Pure Food Manufacturing Company, and the United States Marshal is hereby ordered to immediately restore the seized articles to the Claimant Pure Foods Manufacturing Company of Denver, Colorado, and it is further,

62 Ordered, Adjudged, and Decreed, that the Court expressly retain jurisdiction to issue such further decrees and orders as may be necessary for the proper disposition of this proceeding.

Done in open Court this 20th day of October, 1949.

CARL A. HATCH,
United States District Judge.

Filed October 20, 1949.

Plaintiff's Notice of Appeal.

Notice Is Hereby Given that the United States of America, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Tenth Circuit from the judgment and decree entered in this action on October 20, 1949.

EVERETT M. GRANTHAM,
United States Attorney.
ALBERT H. CLANCY,
Assistant U. S. Attorney.

Filed October 20, 1949.

Clerk's Docket Entry Re Mailing of Notice of Appeal.

63 October 20, 1949. Filing notice of Appeal on behalf of plaintiff.

October 20, 1949. Copies of Notice of Appeal mailed to Wilson & Whitehouse, Esquires, Attorneys at Law, 806 First National Bank Building, Albuquerque, New Mexico, and Ireland & Ireland, Esquires, and Benjamin F. Stapleton, Esquire, 802 Midland Savings Building, Denver, Colorado, attorneys for Claimant.

(Excerpt taken from Civil Docket No. 36, Page 248).

Order Staying Execution.

This cause coming on to be heard this 20th day of October, A. D., 1949, and the Court having on this date filed Judgment and Decree in said cause, and being advised that Notice of Appeal has been filed by the United States of America, it is therefore,

Ordered, Adjudged, and Decreed, that the execution herein be stayed until a final decision has been handed down on appeal.

Dated this 20th day of October, 1949.

CARL A. HATCH,
United States District Judge.

Filed October 20, 1949.

Order Extending Time for Docketing Appeal.

64 This matter coming on to be heard this 28th day of November 1949, upon the petition of an Assistant United States Attorney, praying for an extension of time within which to file the record on appeal, the Court having considered same, and being sufficiently advised in the premises:

It Is Hereby Ordered that the time for docketing the record on appeal in the United States Court of Appeals, Tenth Circuit, be and the same is hereby extended to ninety (90) days from and after October 20, 1949, the date on which the original notice of appeal was filed.

At Santa Fe, New Mexico, this 28th day of November, 1949.

CARL A. HATCH,
United States District Judge.

Filed November 28, 1949.

Pre-Trial Conference and Trial.

Before: Hon. Carl A. Hatch, Judge.

14 Albert H. Clancy, Assistant United States Attorney; Leonard Hardy, F. D. Clark, Pure Food and Drug Administration, attorneys for the government. Wilson & Whitehouse (By Mr. Wilson), Benjamin F. Stapleton, Jr., attorneys for the claimant.

The Court: I Suppose, Mr. Stapleton, you dictate for the record what you are willing to stipulate to and see if the government will agree to it.

15 Mr. Stapleton: We will stipulate that under—we will stipulate that the product seized is an imitation jam containing less than 45 per cent fruit base, and containing 55 per cent sugar, that it is sold in the 5 pound 2

ounce container, it is transported in interstate commerce, which we have admitted in our answer.

Mr. Clancy: Mr. Stapleton, may I ask you if you will go further and admit the labeling on it as it is?

Mr. Stapleton: We will admit the labeling on it.

Mr. Clancy: Will you admit that the United States Marshal seized this, and it is now in Raton, New Mexico?

Mr. Stapleton: We have no objection to that. We want to get down to the basic question in the case.

Mr. Clancy: The government itself will admit that this is a food.

The Court: Yes.

Mr. Stapleton: Well, is the government willing to admit that it is a wholesome food?

Mr. Clancy: Yes.

Mr. Stapleton: That it has food value.

Mr. Hardy: Well, I will put it this way, we are perfectly willing to admit it, but we object to its introduction, because it has nothing to do with the case. We are not charging it is adulterated and that it represents something it is not.

The Court: It is admitted it is a food and has food value. Whether it is material or not, you don't disagree with that?

16 Mr. Hardy: No, sir, the government is willing to admit that the label is such as it is. But for the truthfulness of the label the government is not willing to stipulate to that, which gets back to the first point raised by Mr. Stapleton in which he said they were willing to stipulate that it is an imitation jam. The government is willing to stipulate it is a jam that doesn't comply with the definition standards of identity, but not willing to stipulate it is an imitation jam.

The Court: There is a point of difference on what is jam and imitation jam.

Mr. Stapleton: That's right. . . . Now we are willing to stipulate that the 5 pound 2 ounce jar is intended for the ultimate consumer, and is in great quantity used by individual purchasers in place of butter and marjarine on the family dining table.

Mr. Hardy: I don't see that that fact is at issue. First, the government intends to prove exactly how the product has been used other than the way indicated by Mr. Stapleton, that is, by restaurants and eating places in which the ultimate consumer sees nothing but the jam put out on his plate and knows—and has no opportunity to see the label at all.

The Court: I believe you gentlemen can get down to your basic difficulties by agreeing that the article in question just labeled grape jam doesn't comply with the standard prescribed for grape jam.

17 Mr. Stapleton: That's right. I agree to that.

Mr. Hardy: Go one step further, Your Honor. The seizure involved six different kinds of jam.

The Court: The same agreement will be made as to all the articles taken under this seizure.

Mr. Stapleton: Yes, it being understood we contend this is not grape jam at all.

The Court: I understand. That is agreed. That these articles seized do not comply with the standards set up for the article itself in its true form of grape jam or whatever it might be. It is your contention that it is an imitation jam, and that it does comply with the standard in that regard.

Mr. Stapleton: Yes, sir.

The Court: Well, there isn't so much difference between you gentlemen as I see it. The next question is whether

you can manufacture an article like this and call it when a standard is prescribed for the real article.

Mr. Stapleton: That is basically the issue as I understand it.

Mr. Hardy: That's right, of course, understanding that it is the government's position that an imitation of a standardized article necessarily purports to be and represents the standardized article, and therefore is an illegal article of commerce.

18 The Court: In other words that you cannot make something for which standards are prescribed and call it imitation. It must comply with the standards.

Mr. Hardy: That is correct, Your Honor.

The Court: Of course, to that you disagree.

Mr. Stapleton: Yes, sir.

The Court: That is the point of disagreement. Can we dispose of the case on that legal question?

Mr. Stapleton: We would be very willing to. That is the basic question, and we stand to win or lose on that specific question.

The Court: It would simplify the issues greatly if that is the government's position, and that is the question you want determined.

Mr. Hardy: That is the ultimate question. Of course, it seems to me in order to bring that legal question in for consideration there must be stipulated for the purpose of the legal argument that the jam purports to be and is represented as jam, for which a standard of identity has been established.

The Court: Are you willing to agree, Mr. Stapleton, that this article is so served in hotels and restaurants and logging camps and the places Mr. Hardy has mentioned, without conceding the legal effect of that? But as a fact, is it not so?

Mr. Stapleton: I will say this, Judge, we can't say that they have been deceived or misled in any respect in the matter.

The Court: I am trying to get the facts to see what we can eliminate for the purpose of disposing of this as a legal question. Are you willing to agree that this article is served in those places as indicated by the government and as the real genuine jam and not an imitation?

Mr. Stapleton: No, that is beyond our knowledge. As I see it, we have no knowledge whatsoever that it is being served that way.

The Court: That is the essential part of the government's case as I take it.

Mr. Hardy: Yes, Your Honor, it is.

(Further discussion.)

Mr. Stapleton: Your Honor, we are willing to stipulate this was sold to restaurants and hotel managers and foremen of logging camps, but we can't go any further than that and say there is any deception there. If that would be any help in the case, we will go that far.

Mr. Hardy: Will you go further and say that the hotel managers and logging camp operators and ranch operators sold the same to their patrons and employees without disclosing to them the label on the article and without disclosing to them this is or is not a pure jam?

Mr. Stapleton: No, that is our case again.

The Court: I believe as a matter of fact that you could stipulate to that, Mr. Stapleton. They don't disclose to their patrons that this is labeled imitation jam, and they don't disclose it to their employees out on a ranch or logging camp that this article is labeled imitation and that is what we are feeding you. I just can't conceive of them doing that.

20 Mr. Stapleton: I am trying to say that shouldn't be an issue in the case.

The Court: As a legal point you could—well, I guess it would not be admissible as evidence or has no material effect on the legal point—but, as a matter of fact, as I stated a while ago, without conceding any legal effect and maintaining that it is inadmissible as evidence and the court should not consider it in determining the legal point, I think you could well stipulate as to that fact.

Mr. Stapleton: Well, now let's see if we can't get a stipulation on that. We would stipulate that in logging camps, restaurants and other public eating places that this jam that has been seized in this case will be served to patrons without disclosing the label on the jars. Does that cover the situation?

Mr. Hardy: That would cover the situation in logging camps and on ranches and in most eating places with the one exception of the case that—one example which the government has where they do print on the menus that jams and jellies are served with the above meals. To that extent the government contends there isn't any jam or jelly, and when the proprietor puts that on his menus, he must necessarily mean pure jams and jellies are served.

21 The Court: I think that point can be met if you gentlemen will agree to go just a little further in your stipulation and say that it is served as jam without disclosing the contents or label and that it is imitation jam.

Mr. Stapleton: That is all right, it being understood we can object to the admissibility of such evidence.

The Court: That is understood. And offer to the Court anything it may consider in passing upon the legal point, that you think it isn't material and has no legal effect whatever in this case.

Mr. Hardy: Now, Your Honor, it is a legal question.

The Court: It looks to me like you have gotten down to a legal question.

Mr. Hardy: If so, couldn't you settle that right at this pretrial conference. If you rule that is inadmissible, the government has no case.

The Court: Are you gentlemen willing to proceed at this time to discuss the admissibility of that evidence and have the Court rule on it at this pre-trial conference?

Mr. Hardy: We are ready.

The Court: I will be glad to hear you on that. We will take a recess for five minutes before we start.

(Recess.)

22 Mr. Clancy: In the event the Court should hold that the government's evidence is inadmissible, would we be precluded from taking an appeal? In order to get the record in such shape that an appeal could be taken if the government decides it is their intention to appeal, will opposing counsel stipulate that for the purposes of appeal no question will be raised on the fact that this was at the pre-trial conference?

The Court: Well, now let me interrupt there just a minute, Mr. Clancy, I was thinking about that situation. I judge that whatever way the Court decides this point the case will be appealed, and the record should be made in a proper way so that there will be no question as to the rights of either party. I suggest now that we abandon the pre-trial conference that I set this case for immediate hearing as a non-jury trial, and that you make your statement of facts dispensing with evidence. Counsel can agree to those facts. Then to get down to the question of your proof on this particular point. You make your offer of proof as you would at a trial. Counsel can make their objections, and the Court will rule on it, just as it would at a trial. In fact, this will be at a hearing.

Mr. Stapleton: I have no objection to that. You bring up the question as to whether at a pre-trial conference the question of admissibility of evidence is raised?

Mr. Hardy: No, my point is that should the Court hold against us could the government—

23 The Court: I think my suggestion would be better and would obviate any question at all.

Mr. Stapleton: That is right. We will only argue the part as to the admissibility of the evidence at this time and move a continue—if it is admitted in evidence, we will continue the case to hear the full evidence on that point?

The Court: No, right now, let's have the trial, the entire case, the legal argument on the entire case. I assume you gentlemen are ready?

Mr. Stapleton: We are ready on the legal argument, but there are other questions of fact.

The Court: Suppose the Court should rule against you and say the Court would admit it, would you then want to have the privilege of offering contradictory testimony?

Mr. Stapleton: Yes, sir, I would, and I would also like to argue. . . . (Further discussion between Court and counsel.)

The Court: Well, let's proceed now on a regular hearing, and we will go as far as we can go, and then if it develops that additional testimony is needed from either or both sides, the cause will be continued until some time when that evidence will be available. Now at this time, by agreement of counsel, the pre-trial conference is discontinued. The case is set for immediate hearing before the Court, and the parties will proceed with the introduction of such testimony, and the making of such argument, and such offers of proof as they desire. Now the government has

24 the burden of proof, and I suggest that you state briefly the facts which have been heretofore agreed upon, and when you have finished let Mr. Stapleton then

say whether or not he agrees. This is a brand new record we are starting on now.

Mr. Hardy: It is the government's understanding that it is agreed between counsel for both sides that the article under seizure was shipped in interstate commerce, that it is food within the meaning of the Pure Food, Drug and Cosmetic Act, and the article has been seized by the United States Marshal, and is now in his possession, that the article is labeled as set forth in the libel filed by the government, that there is definition and standard of identity duly promulgated by the Secretary of Agriculture, establishing definitions and standards for jams and preserves, that the article under consideration does not comply with the definition and standard of identity so promulgated.

(Off the record discussion.)

That the articles under seizure or exactly similar articles have sold to restaurants, eating places, ranches, and logging camps, and that the contents have been fed to consumers and employees without disclosing the label on the container and without advising the consumer whether or not the article was a pure or imitation jam.

Mr. Stapleton: I didn't go to that last clause.

The Court: I think that is an addition. The words used were "without disclosing." That is what you agreed to. You have ordered without advising. I don't know that there is any difference.

Mr. Hardy: Shall we stop with the stipulation without disclosing?

Mr. Stapleton: Yes.

The Court: Of course, that agreement is made subject to the legal objection that the proof will not be admissible in evidence.

Mr. Hardy That's right.

Mr. Stapleton: That's right.

The Court: I believe you have sufficiently covered the facts down to that point. I will hear you now on whether that evidence is admissible.

(Argument of counsel.)

Mr. Stapleton: I wonder if those words could be without disclosing it was an imitation jam.

The Court: It amounts to the same thing.

Mr. Stapleton: I want the record to show that the article itself was labeled imitation.

The Court: I think you might go further, unless the record may be in error about this, and indicate that this article was consumed solely by patrons of hotels, restaurants, and logging camps, and ranches, and that it is also an article sold to the public generally and is used by housewives and others purchasing it. In other words, you are not confining it just to the ranches and hotels and logging camps.

26 Mr. Hardy: Of course, the government wouldn't attempt to prove that, Your Honor. Our position is that it doesn't make any difference whether they see the label or not in the last analysis.

The Court: From what has been said, if it is material the Court will consider that it is generally used.

Mr. Hardy: All right.

Mr. Stapleton: I wonder if I could add one more thing. There is no disclosure by the ultimate purchaser. I think that is important in the line of the poppy seed case. You are saying there is no disclosure by the ultimate purchaser, and I think that should be inserted in our agreement.

Mr. Hardy: I think the man that has to digest the food is the one we are interested in.

The Court: The point is that there is no disclosure by the purchaser, the hotel to the man that eats the food.

Mr. Hardy: The ultimate consumer has no knowledge of the label on the object under seizure.

Mr. Stapleton: That's right.

The Court: All right.

Mr. Stapleton: I will try to be as brief as I can and still cover the situation.

(Argument of counsel.)

27 The Court: Now, my mind has been going through something else. I am still trying to dispose of this case today. Will you further state for the purpose of the record, Mr. Hardy, what your witnesses would testify, not whether it is true or not or as to the legal effect, but what would be the testimony of your witnesses if they were produced in Court, can you state that or do you want a little time to think about it? My thought is that if after you make your statement as to what these witnesses would testify if present, then counsel for the other side might agree that they would so testify, and the Court could consider it as the testimony of such witnesses, if the Court decides the evidence is admissible. And then in the same way you could state, Mr. Stapleton, what your witnesses would testify if present without binding the government as to the truth of the witnesses' testimony. And in that way make a record upon which this case could be decided without bringing the witnesses here in person.

Mr. Hardy: Any statement I would make, Your Honor, I wouldn't want to be wholly bound by it because our case hasn't been completely developed at this stage but has been developed far enough to tell what witnesses we have and what they will testify to. There are other witnesses which we have fined up and which we can't state what they will testify to at the present time. We have learned some unusual facts on this pleasant visit to your fair city.

28 The Court: Would the facts that you could state that your witnesses can testify to, would they be sufficient for the Court to base a decision on, or are these other witnesses essential to your case?

Mr. Hardy: It is a very difficult question, Your Honor. I think I will have to leave it to your judgment.

The Court: I am not particular about saving the Court's time any more than counsel. You have come a long way, and if we could reach some kind of record that would prevent bringing these witnesses here, it would help all of us.

Mr. Hardy: I would have to leave it to your judgment to state whether the evidence we have now would be sufficient to sustain our case.

The Court: I think it is sufficient to sustain your point that you are raising. At this time, I don't want to say that it would be sufficient to sustain your case.

Mr. Hardy: Then, we are just looking to the point I am putting.

The Court: Yes.

Mr. Hardy: The first witness we will put on will be an inspector of the Pure Food and Drug Administration who will testify that he visited the dining room of a certain hotel. May I give the name of the hotel?

The Court You can if you desire. I think it would be better. Do you require the name of the hotel, Mr. Stapleton?

29 Mr. Stapleton: It isn't material to me.

The Court: All right. You need not give it.

Mr. Hardy: If we don't go to trial, I would rather it not be in the record.

The Court: You are at trial now.

Mr. Hardy: All right. The Yucca at Raton, New Mexico. That he ate a meal in the Yucca Hotel and read the menu, and the menu had printed on it "jellies or preserves served with the above orders."

The Court: Jellies or preserves?

Mr. Hardy: Served with the above orders. He visited the kitchen of the Yucca and asked to see the preserves and jellies they were serving in response to their customers' rquest for jellies or preserves as set out on the menu, and he was shown a number of jars of the article under seizure. He asked the hotel proprietor, did he serve these in response to customers' request for jellies, and he said he did. Jellies and preserves. The witness would testify that he asked the hotel proprietor did he advise his patrons that the jams and preserves were imitation, and he said he did not. We would introduce the proprietor of the Yucca Hotel who would testify—strike that please. We would put in evidence as a government exhibit a copy of the menu of the Yucca Hotel. I would have this identified by the proprietor of the hotel as being a menu of his hotel. The proprietor of the Yucca Hotel would testify that in response to the statement printed on his menu and the request of his patrons jellies and jams he served them, the imitation branded jam, which we are here considering. The Pure Food and Drug Inspector who ate it at this Yucca Hotel would testify that he asked the proprietor of the hotel whom he purchased the jam from and was advised whom he purchased it from, that he visited the wholesale house from which the hotel proprietor purchased the jam, and there observed the actual jam which is under seizure. The wholesale house advised him, advised the inspector, that he purchased the jam from the Pure Food Manufacturing Company of Denver, Colorado. The witness would testify, the inspector, that he notified the United States Marshal, and the libel was duly filed and parent lot in the wholesale house was seized and is the subject of this trial. There would be proprietors from eight or nine restaurants testifying to the effect that they served imitation Delicious Brand jams of one type or another to their patrons when their patrons asked for jams and jellies. In these cases, there would be no introduction of menus, because the menus did not bear the mention that jams or jellies would be served with the orders, but the proprietors would testify

that when they were requested to serve jams and jellies that they served the imitation product. We will have a witness—

31 The Court: Those witnesses did not disclose to their patrons that it was—

Mr. Hardy: These witnesses would all testify that their patrons had no way of learning, and did not in fact learn, that the jams they were eating were the Delicious Brand imitation jams. We would have witnesses from grocery stores who would testify as their ads certain ads in newspapers in which it was stated—in which advertisements were made for, say, strawberry jam or a plum jam or pure preserves, that they were in fact advertising Delicious Brand imitation jams, that in response to telephone orders from housewives asking that they be sent some of the preserves and the jams advertised, that they filled these orders by sending the jams and preserves. We would have—

The Court: Now, but what jams and preserves?

Mr. Hardy: The jams and preserves of the type under seizure, Your Honor, in response to telephone orders. We would have, I can't say how many, Your Honor, but witnesses who purchased for one or more logging camps, and persons who purchased for one or more ranches, and persons who purchased for chuck wagons, for sheep ranches, who will testify that they buy the article under seizure or the type of article under seizure, the Delicious Brand imitation jam in the 5 pound 2 ounce container and served this to the employees of the Chuck Wagons and ranch dining rooms as jam and in no way disclosed to the employees that they are in fact imitation jams rather than pure jams. That is the extent of our case at the present time, Your Honor.

32 The Court: Now, Mr. Stapleton, without waiving your objection to the admissibility of this evidence, would you be willing to agree now that these witnesses named by the government and indicated as to their testimony by Mr. Hardy would so testify if they were present, and that

the Court might consider such testimony without actually bringing the witnesses here?

Mr. Stapleton: There is no objection to that.

The Court: Then, that is so agreed. Now, Mr. Stapleton, still reserving all your rights as to the admissibility of any of this testimony, are you prepared to state what witnesses you would produce and what they would testify to, if present.

Mr. Stapleton: May we have just a moment.

The Court: Yes, I realize I am just trying to wind up this case quickly.

(Recess.)

The Court: Mr. Stapleton, are you ready to state what your witnesses would testify?

Mr. Stapleton: We would first put on Mr. H. C. Fishback, the president and general manager of the Pure Food Manufacturing Company of Denver. He would state that he manufacturers the articles seized in this proceeding, that they were manufactured under pure and sanitary conditions,
33 that the product manufactured and seized in the instant case was wholesome and had food value, that the label imitation strawberry jam and other jams, as seized in this case, were truthful labels and set forth the quantities of the respective ingredients of the imitation jams, that these jams, imitation jams, had been manufactured by the Pure Food Manufacturing Company for a period in excess of fifteen years prior to the instant seizure, and that prior to that time the company had manufactured what was known as a compound jam which was in effecet the same type and consistency of jam now being produced, but at the request of the Federal Food and Drug Administration in Denver, Colorado, this label was changed to imitation jam, that these goods are sold to wholesalers in Montana, Wyoming, Nebraska, Colorado, part of Kansas, and New Mexico, and that a majority of the five pound two ounce jars are imitation jam, such as were seized in the instant case, are mar-

keted through retail food stores to ultimate consumers, that the articles are marketed through retail food stores are displayed prominently with the label as on the articles seized, and that in the majority instances, the price of the imitation jam is 50 per cent lower than the pure fruit jams and preserves which are in accord with the definition and standard of identity for pure fruit preserves, that the company maintains in the New Mexico trading area a salesman employed by the claimant who devotes his exclusive time to
the sale of five pound two ounce jars to retail food
34 stores for purchase thereby the ultimate purchaser, that the claimant does not make any concentrated effort to sell this product to hotels, restaurants, logging camps, ranches, and other similar institutions, but that the wholesaler in his discretion may sell to such types of outlets. Mr. Fishback would also testify that he has many instances where the consumer writes into the company stating that they prefer the imitation jam to the pure fruit jam, and in many instances the claimant company receives correspondence from outside the trading area asking where such imitation jams may be obtained. There will also be witnesses who are consumers who have purchased this product at retail in the New Mexico trading area who will testify that they purchased the product as imitation jams, realizing that there was a deviation in the price of over 50 per cent between the pure fruit jams and preserves and the articles similar to those seized in this proceeding, that these consumers will further testify that they bought the seized product in five pound two ounce containers for use on the family table in lieu of butter or oleomargarine which are more expensive food products. Further, we would have a witness who would identify imitation jams and jellies are a food separate and apart from pure fruit jams and jellies and are so known in the trade. Now, this witness would refer to the United States Department of Commerce pamphlet entitled Domestic Commerce, Volume 35, issue No. 5,
of May, 1947, in which the Department of Commerce
35 is summarizing the jelly and jam industry in the United States and which states as follows: At page

62 of Volume 35, Issue No. 5, "Imitation jellies account for a very small percentage of the total jelly production, and the trade states that they are gradually going off the market. They consist entirely—they consist partly or entirely of pectin solution or apple pulp extracts and sugar for materials and artificial coloring. These imitation jellies must be labeled 'imitation fruit jellies.' They are generally sold at lower prices than the pure jellies." This witness would further testify that the trade journals or the National Preservers Association have in the last year constantly stressed the need for forcing the imitation jam and jelly manufacturers off the market, and that Mr. Forbes, the general counsel for that association, has been leading the drive for a determination of this issue in favor of the pure fruit jam manufacturers. Mr. Fishback will also produce the books to show what percentage of his volume of manufactured imitation jams and jellies are sold directly to the retail food stores from the wholesale distributors of the product, and that that distribution will show in excess of 50 per cent going to the retail food outlets. That, Your Honor, would be the case of the plaintiff if allowed to present it.

The Court: What do you say, Mr. Attorney, you and Mr. Clancy? Are you willing to agree that these witnesses would testify to the facts which have been detailed by Mr. Stapleton? Subject to the exception as to the competency and materiality and relevancy of such testimony?

36 Mr. Hardy. Of course, there would be violent objections to certain portions of that, particularly with reference to opinion testimony as distinguished from factual testimony.

The Court: You refer to the testimony concerning what Mr. Fishback—

Mr. Hardy: Mr. Fishback, particularly, and we think what Mr. Forbes thinks is without materiality. Mr. Fishback's opinion as to whether this goes to one type of group or another is pure opinion evidence, and we would object to that.

The Court: Subject to those objections and any other objections on the grounds of admissibility, would you agree, if admitted, these witnesses would so testify?

Mr. Hardy: I see no reason why the claimant would not be able to procure witnesses who would testify as he has indicated.

The Court: Upon the agreements, gentlemen, which you have made, are you now willing, subject again to the admissibility of the testimony, for the Court to consider this evidence which you have both related the witnesses would testify to as evidence and make its findings of fact upon the statements as made?

37 Mr. Hardy: The government would like to add just a little to its case, which we haven't developed now but feel sure we would. We have no doubt that we would be able to present to the Court witnesses from logging camps and ranches in the form of employees who have actually eaten this jam and who had—who would testify that they thought it to be jam, believed it to be pure jam, and had no way of determining that it was other than pure jam.

The Court: And did not know it was an imitation product?

Mr. Hardy: That is correct, Your Honor.

The Court: Would you agree, Mr. Stapleton, that these employees of the logging camps and ranches would testify that they actually ate the jam without any knowledge that it was not a genuine product.

Mr. Stapleton: That was if they did not have the opportunity to see the label on the product.

The Court: You will agree that they will so testify.

Mr. Stapleton: If they did not have an opportunity to see the label on the product. I doubt whether they did.

The Court: You can prove that in your statement. They would testify that they had not seen the label on the product;

Mr. Attorney? You will include that as part of the evidence these men would give that they had not seen and had no knowledge of the label on the product?

Mr. Hardy: Yes, sir.

38 Mr. Stapleton: May I ask a question there? Actually what we are doing is saying that these people would come up and say they didn't have the opportunity to look at the label, and that they ate it and couldn't determine it was fruit jam—

The Court: Even further than that. They would testify, according to Mr. Hardy, that they thought it was the genuine article.

Mr. Stapleton: I think that is all right. We have no objection.

The Court: All right, that will be so considered then. Do you have anything further, Mr. Hardy?

Mr. Stapleton: We would be very happy to admit that last.

The Court: You might get out some advertising on that.

Mr. Hardy: Before the Court made a determination in findings of fact and conclusions of law, the government would like to file with the Court and with the claimant's attorney a trial brief, which has been carefully prepared and which we believe should be considered primarily on legal questions. Of course, if the case is decided by Your Honor solely on the factual issues, the brief would have no application.

The Court: I think you are getting it in shape so that the Court can really decide it as a matter of law. There isn't any dispute as to the facts, I don't believe.

(Further discussion between Court and counsel.)

The Court: At this time, under the agreement of counsel, the Court is going to admit the testimony which has been

detailed by the government and also the testimony
39 which has been related by the claimant, subject to the admissibility of such evidence in arriving at a decision in this case, the Court being mindful that it is a trial without a jury and will try to exclude from consideration any and all incompetent testimony. In that regard, the Court will say that is considers the testimony as to what this commerce quarterly said and as to the motives of Mr. Forbes as being highly incompetent, and the Court will not consider those in reaching a decision. With that statement, the Court will proceed to make its findings of fact. It will state that the findings of fact are based on the agreements which have been made before counsel related what witnesses would testify and also including the testimony to which the parties have agreed the witnesses would testify, and which the Court might consider in reaching its decision.

The Court finds as a fact that this action was filed by the United States for the seizure and condemnation of certain articles of food under the federal Pure Food, Drug and Cosmetic Act; that the Pure Food Manufacturing Co. of Denver, Colorado shipped in interstate commerce from Denver, Colorado to Charles Ilfeld Co. in Raton, New Mexico, by truck of the Charles Ilfeld Co., on or about January 19, 1949—I am reading these statements from the complaint.

Mr. Stapleton: We admit all that to be true.

The Court: Paragraph 2, you admit all of that?

Mr. Stapleton: Yes, sir. On or about January 19, 1949, an article of food consisting of 62 cases, more or less, each containing 6 jars of jam, assorted flavors, individual jams being labeled in part . . .

40 (Off the record discussion.)

The Court: As follows—and just quote the label.

Mr. Hardy: Yes, sir, that would be an exhibit.

The Court: Yes. That said articles were in the possession of Charles Ilfeld Co. at Raton, New Mexico, within the

jurisdiction of this court. The Court further finds as a fact that the articles in question were sold to various wholesalers, retailers, within the State of New Mexico, and that some of the same was later resold to hotels, restaurants, ranches, logging camps, within the State of New Mexico. That on at least one of the menus of a hotel in the State of New Mexico the menu carried the words "jellies or preserves served with the above orders," and patrons of the hotel requesting such jellies or preserves were served the product involved in this proceeding without disclosure by the hotel to the patron that the article was the imitation jelly or preserve, and that the patron had no opportunity of seeing or observing the label or knowing he was eating and actually consuming an imitation product; that the same is true of jellies and preserves served by some ranches, logging camps, to employees thereof; that such employees ate and consumed such product without having disclosed to them the fact that it wasn't
41 the genuine article but was an imitation, and they had no opportunity of seeing or observing the label on the same.

The Court further finds as a fact that the product in question was generally sold by retail dealers to the public, housewives and others, and that to such purchasers the product bore the label as hereinbefore set forth.

The Court further finds as a fact that retailers advertised preserves and jellies for sale, and that in filling telephone orders for the same from housewives or other purchasers they frequently filled such orders with the product in question.

Am I overlooking any facts that should be found, gentlemen?

Mr. Stapleton: How about the manufacture and . . .

The Court: The Court further finds that the product in question is of food value and is wholesome and in every way fit for human consumption.

Mr. Hardy: Doesn't the Court think it should make a

finding that there are standards of identity established for preserves and jams and this doesn't comply with them.

The Court: The Court further finds that the Pure Food and Drug Administration has established definitions and standards of identity for jams, jellies, and preserves; that the article in question doesn't comply with such standards, and doesn't purport to so comply.

42 Mr. Hardy: Can we have a finding that this is a matter of fact imitation strawberry jam?

(Off the record discussion.)

The Court: The Court finds and determines the product in question to be as composed and manufactured and set forth in the label. Whether it is an imitation or not will be a matter of argument. The actual thing itself is the finding of fact. That meets your . . . ?

Mr. Hardy: We don't think it is a legal argument so much as a factual one.

The Court: I have made the finding that the article is as set forth in the label.

(Off the record discussion.)

The Court: The finding of fact as to the contents of the product being identical with that as stated on the label is subject to the possible qualification that the twenty per cent pectin, as stated on the label, would probably be a twenty per cent pectin solution. Is that correct?

Mr. Stapleton: Yes, sir.

Mr. Hardy: Yes, sir.

The Court: That covers it?

Mr. Hardy: That is all we ask, Your Honor.

The Court: Is there any other fact which should be found to present the issue squarely? What I am trying to do is to get a record in which the Supreme Court will have all the record.

43 The Court further finds as a fact that the price of the product in question is substantially lower than the genuine fruit product, of which it is alleged it is an imitation.

Mr. Stapleton: We would like also, Your Honor, to have a finding that this product has been manufactured for a period of fifteen years, and was changed at the request . . .

The Court: I don't see, especially see, the materiality of that. But it isn't disputed, I don't think.

Mr. Hardy: Your Honor, we have searched our files deliberately and we can find no correspondence with the Pure Food Manufacturing Co. to the effect that they should change their label from compound jam to imitation jam. We have been informed by the attorney of the claimant that there was such correspondence . . .

Mr. Stapleton: No . . .

Mr. Hardy: You implied that they had done that.

Mr. Stapleton: That's right.

Mr. Hardy: So we made a very diligent search.

The Court: The only point in that testimony is that it would effect, probably, the good faith of the claimant in this case, and there is nothing here that challenges the good faith of the manufacturer.

Mr. Hardy: No, sir, we are not challenging that.

44 The Court: The Court will find as a fact that the product has been manufactured and marketed through ordinary and usual channels of trade throughout the territory described for at least the period of fifteen years. Do you think of any other facts that should be found, Mr. Hardy?

(Off the record discussion.)

The Court: The Court further finds that no standard has

been set up, or definition, for a product labeled imitation such as is involved in this case.

(Off the record discussion.)

Mr. Clancy: If the Court please, I am prepared at this time to file a brief and give Mr. Stapleton a copy.

The Court: All right. We will recess until 1:30.

(Noon recess.)

The Court: Did you gentlemen think of any other findings of fact that should be made?

Mr. Stapleton: We discussed it at the noon hour and we think the findings of fact are sufficient.

The Court: What do you think, Mr. Hardy and Mr. Clancy?

Mr. Hardy: No amendments to suggest, Your Honor.

The Court: Do the findings of fact the Court made show the size of the jars in which this was contained? I don't know whether it is material or not. By the Court looking at this, it is 5 lbs. and 2 oz.

Court Reporter: It is in the finding in which you describe the label.

45 The Court: All right. Mr. Stapleton, we will hear you now.

(Argument by Mr. Stapleton.)

The Court: Mr. Hardy, you gentlemen have filed a brief. Do you have anything you want to say in addition to what you say in the brief?

Mr. Hardy: You prefer, Your Honor, that I not repeat anything in the brief?

The Court: If this fully covers your case, it happens I do have some other matters which it is just about time to take up.

Mr. Hardy: Your Honor, there are two or three points the claimant has raised I would like to discuss.

The Court: All right, let's proceed.
(Argument by Mr. Hardy.)

The Court: Do you desire to file a brief, Mr. Stapleton?

Mr. Stapleton: I do not. I believe the Court understands fully our position. I would be happy to if you like.

The Court: I won't pass on the law until I read some of these cases the government has filed in their brief. I want to extend them the courtesy of reading it since they have gone to the trouble of filing it. If you wanted to, I would give you a like opportunity.

Mr. Stapleton: I don't think so.

46 The Court: All right, I will take the case, and read the cases, and make an early decision, gentlemen. You have said you have appreciated the Court helping you dispose of the case. The Court appreciates the attitude of counsel. I think we have had the pre-trial conference work into an actual trial where we can dispose of it, rightly or wrongly. It saved considerable time for all of us, and the Court appreciates that, gentlemen.

United States of America, District of New Mexico, ss.

I Hereby Certify That the foregoing transcript is a true record of the matters herein recorded.

Done at Albuquerque, N. M., December 16, 1949.

E. E. GREESON, Court Reporter.

Clerk's Certificate.

65 I, Wm. D. Bryars, Clerk of the United States District Court for the District of New Mexico, do hereby certify that the above and foregoing, consisting of sixty-

four (64) pages, is a true copy of the record, proceedings and evidence designated by appellant for inclusion in the record on appeal in that certain action lately pending in this court, styled and numbered as shown in the title page to this transcript.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said court at Santa Fe, in said District, on this the 12th day of January, A. D. 1950.

WM. D. BYARS,
(Seal) Clerk of Said Court.

Filed, United States Court of Appeals, Tenth Circuit. January 16, 1950. Robert B. Cartwright, Clerk.

And thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Tenth Circuit:

Order: Cause Argued and Submitted.

Second Day, May Term, Tuesday, May 9th, 1950. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Walter A. Huxman and Honorable John C. Pickett, Circuit Judges.

This cause came on to be heard, John T. Grigsby, Esquire, appearing for appellant, Benjamin F. Stapleton, Jr., Esquire, appearing for appellee.

On motion, appellant was granted leave to file typewritten copies of a reply brief herein instanter, which was accordingly done, printed copies to be substituted therefor as soon as the printing thereof can be accomplished.

Thereupon this cause was argued by counsel and submitted to the court.

Opinion.

[June 27, 1950.]

John T. Grigsby, Atty., Dept. of Justice (James M. McInerney, Asst. Atty. General, Everett M. Grantham, U. S. Atty., Albert H. Clancy, Asst. U. S. Atty., Vincent A. Kleinfeld, Atty., Dept. of Justice, Leonard D. Hardy, Atty., Federal Security Agency, were on the brief), for appellant. Benjamin F. Stapleton, Jr., (Ireland, Ireland, Stapleton and Pryor and Clarence L. Ireland, were on the brief), for appellee.

Before Phillips, Chief Judge, and Huxman and Pickett, Circuit Judges.

Phillips, Chief Judge.

This is an appeal from a libel brought by the United States pursuant to 21 USCA §334(a), seeking the seizure

and condemnation of 62 cases of fruit jam of assorted flavors. The libel alleged that the jam was misbranded within the meaning of 21 USCA §343(g), when introduced into and while in interstate commerce and while held for sale after shipment in interstate commerce, because it purported to be and was represented as a fruit jam, a food for which definitions and standards of identity had been prescribed pursuant to 21 USCA §341, and it failed to conform to such definitions and standards in that it was deficient in fruit and was not concentrated to the degree required by the standards.

21 USCA §341, in part, reads:

"Whenever in the judgment of the [Federal Security] Administrator such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality and/or reasonable standards of fill of container • • • ."

21 USCA §343, in part, reads:

"A food shall be deemed to be misbranded—

"(c) If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word 'imitation' and, immediately thereafter, the name of the food imitated."

"(g) If it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by section 341, unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard, • • •."

The definitions and standards of identity for fruit jams, which were established pursuant to 21 USCA §341, after public proceedings, conducted in accordance with 21 USCA

§371(e), provide that fruit jams shall be composed of not less than 45 parts by weight of fruit to each 55 parts by weight of one of the designated saccharine ingredients, and that the soluble solids content of blackberry, strawberry and grape jam be not less than 68%, and of apricot, peach and plum jam, not less than 65%. The jams[1] under seizure contained the ingredients provided for in the standards, but the amount of fruit was greatly reduced. They contained 55% sugar, 25% fruit and 20% of a water solution of pectin and were labeled "Imitation (here was inserted the name of the fruit used) Jam."[2] Below the name of the fruit and word "Jam" on the label there appears in very small type the following:

"Made from 55% sugar, 25% fruit, 20% pectin, citric acid, 1/10 of 1% benzoate of soda."

The facts rest on stipulated admissions and agreement as to what persons would testify, if called as witnesses. It was thus established that the jams under seizure, when introduced into and while held in interstate commerce, failed to conform to the definition and standard of identity which had been prescribed for fruit jams pursuant to 21 USCA §341, in that they were deficient in fruit and were not concentrated to the degree required by the standard; that the five-pound two-ounce size of such jams was served by hotel dining rooms, restaurants and other public eating places to their patrons as fruit jam, without disclosure that the containers from which the food was taken were labeled "Imitation Jam"; that retail grocery stores advertised such jams as fruit jams, and in response to telephone calls from housewives, asking for the advertised jams, filled such orders with the product here involved; that ranches and logging camps served such jams to their employees as jam and such

[1]Such jams were grape, strawberry, apricot, plum, peach and blackberry.

[2]The name of the fruit and the word "Jam" were in larger and bolder letters than the word "Imitation."

employees consumed it, believing it to be fruit jam, and that such jams looked like and tasted like friut jam, and that such jams are wholesome and have food value.

The trial court found that the jams under seizure had the appearance of fruit jams for which a definition and standard of identity had been established; that such jams were made to taste like and did taste like standard fruit jams; that they were used by consumers in the place of and as a substitute for standard fruit jams; that they were often advertised as jam and that orders by the consuming public for jam were frequently filled by delivery of such jams; and that they were served by hotels in response to orders for jams or preserves without disclosure that they did not comply with the requirements for standard fruit jam. Notwithstanding these findings, the court concluded that the jams under seizure did not purport to be, and were not represented as fruit jam, and that they were imitation fruit jams and properly labeled under 21 USCA §343(c).

The jams under seizure contain fruit, sugar and the other usual ingredients of fruit jam; they look and taste like fruit jam, and they are sold and served to customers as fruit jam. They are a sub-standard jam. They are not imitation fruit jam. We think the undisputed facts show that they purported to be, and were represented to be a fruit jam, for which a definition and standard of identity had been prescribed.

The text and legislative history of the statute (Chapter IV of the Federal Food, Drug and Cosmetic Act, 52 Stat. 1040, 1046, 21 USCA §341-346) show that its purpose was not confined to a requirement of truthful and informative labeling. The Pure Food and Drug Act of 1906 prohibited false and misleading labeling, but it had been found that such a prohibition was not adequate to protect the consumer from "economic adulteration" by the substitution of less expensive ingredients, or by diminishing the proportion of more expensive ingredients so as to make the product, although not deleterious, inferior to well-recognized stand-

ards adhered to by housewives and most manufacturers, and inferior to what the consumer expected to receive when purchasing it under the name it was sold.[3] (Sen. Rep. No. 493, 73d Cong., 2d Sess., p. 10; Sen. Rep. No. 361, 74th Cong., 1st Sess., p. 10.) Congress, by §341 and §343(g), did not undertake to remedy the evil by a requirement of informative labeling. Rather, it authorized the Administrator to promulgate definitions and standards of identity, "under which the integrity of food products can be effectively maintained," (H.R. Rep. 2139, 75th Cong., 3d Sess., p. 2; H.R. Rep. 2755, 74th Cong., 2d Sess., p. 4) and provided for informative labeling only where no such standard had been promulgated; where the food did not purport to be a food for which a standard had been promulgated, or where the regulation permitted optional ingredients and required them to be set forth on the label. "The provisions for standards

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[3] Prior to the enactment of the Federal Food, Drug and Cosmetic Act of June 25, 1938, the United States brought a libel asking the seizure and condemnation of a food known as Bred Spred. It contained strawberry flavor, 17 parts of strawberries, 55 parts of sugar, 11½ parts of water, ¼ part of pectin and .04% of a part of tartaric acid. It was not deleterious, but it failed to meet the standards recognized for jam by manufacturers, of not less than 45 parts of fruit to 55 parts of sugar, and by housewives, of 50% fruit and 50% sugar. The trial court denied seizure and condemnation and on appeal the court of appeals affirmed. See United States v. 10 Cases More or Less, Bred Spred, 8 Cir., 49 F. 2d 87.
In H.R. Rep. 2139, 75th Cong., 3d Sess., p. 5, the following appears:

> "Section 401 [21 U.S.C. 341] provides much needed authority for the establishment of definitions and standards of identity and reasonable standards of quality and fill of container for food. One great weakness in the present food and drugs law is the absence of authoritative definitions and standards of identity except in the case of butter and some canned foods. The Government repeatedly has had difficulty in holding such articles as commercial jams and preserves and many other foods to the time-honored standards employed by housewives and reputable manufacturers. The housewife makes preserves by using equal parts of fruit and sugar. The fruit is the expensive ingredient, and there has been a tendency on the part of some manufacturers to use less and less fruit and more and more sugar.
>
> "The Government has recently lost several cases where such stretching in fruit was involved because the courts held that the well-established standard of the home, followed also by the great bulk of manufacturers, is not legally binding under existing law."

of identity thus reflect a recognition by Congress of the inability of consumers in some cases to determine, solely on the basis of informative labeling, the relative merits of a variety of products superficially resembling each other.'"[4]

It is significant that Congress in §343(g) in, dealing with misbranding by failure to conform to the definition and standard of identity, did not permit departure from the standard if the label disclosed that the food did not conform to the standard, whereas in §343(h)(1)(2), in dealing with misbranding by failure to conform to standard of quality and standards of fill of container, Congress permitted departure from the standard if the label on the food set forth, in the manner and form specified in the regulation, a statement that it fell below the standard, thus indicating a Congressional intent to permit departure from standards of quality and fill of container, where such departure was shown by truthful labeling, but not to permit a departure from a definition and standard of identity, even though such departure was disclosed by the label.

Whether a food purports to be, or is represented to be, a food for which a definition and a standard of identity has been prescribed by regulation, is not to be determined solely from obscure disclosures on the label. If it is sold under a name of a food for which a definition and standard has been prescribed, if it looks and tastes like such a food, if it is bought, sold and ordered as such a food, and if it is served to customers as such a food, then it purports to be, and is represented to be, such a food.[5]

We conclude that the jams under seizure purported to be, and were represented to be, fruit jams, for which a definition and standard of identity had been promulgated;

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[4] Federal Security Administrator v. Quaker Oats Co., 318 U.S. 218, 230; Libby, McNeill & Libby v. United States, 2 Cir., 148 F. 2d 71, 73; United States v. 716 Cases, More or Less, etc., Del Comida Brand Tomatoes, 10 Cir., 179 F. 2d 174.

[5] Libby, McNeill & Libby v. United States, 2 Cir., 148 F. 2d 71, 73.

that they did not conform to the definition and standard of identity, and that the manufacturer could not escape the impact of §341 and §343(g) by labeling them imitation jams and by truthfully setting forth on the label the proportions of sugar, fruit and other ingredients contained therein.

It is urged that the effect of our decision will be to compel the manufacturer of these jams to take such product off the market and to deprive persons of modest means of an inexpensive and wholesome food product; and that the portion of the Senate Committee Report set forth in Note 6, infra, shows the Congress did not intend the operation of §343(g) to produce such results. But the results envisioned will not necessarily follow. The manufacturer may market the product as syrup and fruit thickened with pectin, or syrup flavored with fruit and thickened with pectin, but the product may not be lawfully sold or served to customers under the name fruit jam and in such a manner that it purports to be, or is represented to be fruit jam.[6]

The judgment is reversed and the cause remanded with instructions to enter a judgment for condemnation.

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[6] In Sen. Rep. 361, 74th Cong., 1st Sess., p. 8, the following appears:

> "It should be noted that the operation of this provision [Section 343(g)] will in no way interfere with the marketing of **any food which is wholesome but which does not meet the definition and standard**, or for which no definition and standard has been provided; but if an article is sold under a name for which a definition and standard has been provided, it must conform to the regulation. This does not preclude the use of distinctive individual brands. But the loophole afforded the dishonest manufacturer by the so-called 'distinctive name' proviso of the present law will be closed. Under that proviso adulterated and imitation products sold under such names were immune from action. It is not intended that the authorization to make standards of identity shall apply to foods which are truly proprietary, that is, foods distinctive in content as well as in name, in the manufacture of which some person or concern has exclusive proprietary rights." (Boldface ours.)

Pickett, Circuit Judge, dissenting.

Section 341 of the Federal Food, Drug and Cosmetic Act of 1938[1] gives the Federal Security Administrator authority to promulgate regulations fixing and establishing for any food a reasonable definition and standard of identity. The government's position in this case is that "irrespective of what an article of food may consist or the nature of its labeling," it violates the Act "if it purports to be a food for which a definition and standard of identity * * * has been prescribed and does not conform thereto." It says "the fact that the article may or may not be an imitation, or labeled as such, has no bearing * * * upon the question as to whether or not it violates Section 343(g)," It frankly stated to the court that the purpose of this libel was to establish a principle which would bar from interstate trade all substandard or imitation foods regardless of the label if they purported to be foods for which standards had been prescribed. It construed the word "purport" to mean any food which looks and tastes like and is sold and used for the same purpose as that food for which standards are fixed.

If the Government's construction of the statute is correct, then no form of label would permit entry of the seized product into the channels of interstate trade. If its sale is permitted under any form of label it would still look and taste like standard jam, it would be sold and used for the same purpose as standard jam, it would still be purchased and served as jam by hotels and restaurants, it would still be purchased and used as jam by ranchers, logging camps and large families looking for a cheaper but nutritious and wholesome food. To me there is no middle ground; we either accept or reject the government's position. If the product is permitted to be sold under some descriptive label or by a distinctive name, although not meeting the standards, the same objections will be advanced as they were to

[1] Title 21 U.S.C.A. 341.

the "Bred Spred" case. U. S. v. Ten Cases, more or less, Bred Spred, 8 Cir., 49 F. 2d 87.[2]

It is clear to me that the very purpose of Section 343(c)[3] is to permit on the market a wholesome and nutritious food which is within the means of a great mass of our people who are unable to purchase the standard products. At the time the bill was being considered by Congress, the Food and Drug Administration so recognized the necessity for such products.[4] Senator Copeland who sponsored the bill recognized the right to sell substandard foods, said, "It should be noted that the operation of this provision will in no way interfere with the marketing of any food which is wholesome but which does not meet the definition and standard, or for which no definition and standard has been provided." Dunn, Federal Food, Drug and Cosmetic Act, page 246. The administrator construed the Act to permit a substandard article to be labeled as an "imitation" at least as late as 1941 and took no different view until 1945, Kleinfeld & Dunn, Federal Food, Drug and Cosmetic Act 1938-1949, p. 627, 712. Until this action was brought the label on products of the claimant was never questioned by

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[2] The distinctive name provision was left out of the 1938 Act because of this and similar decisions. H. Rep. No. 2139, 75th Cong. 3 Sess., p. 5.

[3] Title 21 U.S.C.A. 343 (c): "If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word 'imitation' and, immediately thereafter, the name of the food imitated."

[4] Walter G. Campbell, Chief of the Food and Drug Administration, testifying before a subcommittee in the House of Representatives in connection with this identical type of product, said:

"Mr. Kenney. What is the other ingredients besides the fruit?

"Mr. Campbell. There is fruit, sugar, and pectinous material acquired from fruit, which is just a gelatinizing agent, that enables you to incorporate large quantities of water, all in lieu of the one-fourth amount of fruit deficient in that product as compared with the standard preserve. So that water and pectin have been substituted. * * *

"Mr. Chapman. What effect would the provision of Senate 5 have on the manufacture and sale of a product like that?

"Mr. Campbell. Senate 5 provides for standards. That product would be a substandard article and its marketing as a preserve would be proscribed.

the Administrator, in fact it is the label suggested by him. He does not question its sufficiency now. It was designed to meet the requirements of 343(c) by showing that the product did not meet the standards but was an imitation. No other word or combination of words in the English language could be used which would so well call to the attention of the purchasing public the fact that the labeled food was not a standard product. It is a word of common usage and understanding. Webster defines it to mean: "the form of something regarded as a pattern or model * * * an artificial likeness * * * simulating something superior, esp. something more costly." Necessarily any imitation would have the appearance of that which it imitates. In this case the jam did look and taste like that which meets the prescribed standard but it is labeled "imitation" in the manner required by the statute. If the section is not given this construction it is meaningless.

The government relies strongly upon the Quaker Oats decision in the Supreme Court[5] and the Catsup case in the Second Circuit.[6] These cases involved foods which were

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[4]Continued—

"Mr. Chapman. That would be shown on the label?

"Mr. Campbell. It would have to be shown on the label just what it was, and enable the consumer to buy it for what it was.

"There can be no objection to the philosophy that any article that is wholesome and has food value and is sold for what it is, without deception, should be permitted the channels of commerce. There can be no objection to that article with its deficiency of fruit if every consumer knows exactly what he is buying.

"There can be no objection to the sale of skimmed milk if the buyer knows that it is skimmed milk when he is buying it.

"Mr. Chapman. It contains no injurious ingredient?

"Mr. Campbell. It contains no injurious ingredient. But the point that it illustrates, Mr. Chapman, is that the distinctive trade name proviso, which I read to you in the present act, offers a means by which a complete circumvention of the requirements of that law can be effected.

"S.5 is silent on distinctive names. It eliminates that particular provision which, as I said, is a sin of commission."

Hearing before a Subcommittee on Interstate and Foreign Commerce, House of Representatives, 74th Congress, 1st Session, H.R. 6906, H.R. 8805, H.R. 8941 and S. 5.

Dunn, Federal Food, Drug and Cosmetic Act, page 1239.

[5]Fed. Security Administrator v. Quaker Oats Co., 318 U.S. 218.

[6]Libby, McNeill & Libby v. U. S., 2 Cir., 148 F. 2d 71.

being sold as standard products. Each recognized that informative labeling could be used "where the food did not purport to comply with the standard."

A large portion of the food consumed today comes within the provisions of the Act. To sustain the government's position here gives the Federal Security Administrator absolute control over the ingredients of all such foods. He will have the right to standardize the same, which will mean virtually a standardization of the price. It will remove from the market a nutritious and wholesome food which sells for approximately one-half the price of the standard product. The purchasing public, regardless of their ability to pay, will be forced to purchase the same quality of food. I cannot believe Congress had any such intent. I would affirm the trial court.

Judgment.

Twenty-Second Day, May Term, Tuesday, June 27th, 1950. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Walter A. Huxman and Honorable John C. Pickett, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of New Mexico and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court with instructions to enter a judgment for condemnation.

Petition for Rehearing.

Claimant-Appellee respectfully petitions the Court to grant it a rehearing and to reconsider its opinion filed herein on June 27, 1950, for the following reasons:

I.

The majority opinion failed to give weight to the plain ordinary meaning of the word "imitation" on the label of the seized article. The majority of the court evidently took the position that the word "jam" on the label constituted a representation that the product was the standardized article, even though the label bears, in type uniform size and prominence, the word "imitation" and immediately thereafter, the name of the food imitated. The imitation provision of the 1938 Act, Section 343 (c) must be given the meaning that Congress intended that it should have. The majority opinion has made 21 U. S. C. A. 343 (c) absolutely meaningless. Under its view even a food for which no standard of identity has been established would be represented as a genuine article even though such article bore an imitation label in conformity with Section 343 (c).

II.

The majority opinion indicated in footnote 2 at Page 3 of the typewritten opinion that the label was not printed in conformity with 21 U. S. C. A. 343 (c). The court states that "the name of the fruit and the word 'Jam' were in larger and bolder letters than the word 'Imitation'." The government at no time contended nor does it now contend that the label did not conform with 21 U.S.C.A. 343 (c). In fact, the claimant-appellee changed its label from "compound jam" to the present label at the request of and with the approval of the Food and Drug Administration. The court therefore erred in stating that the label of the seized article does not meet the requirements of Section 343 (c). In interpreting the decision of the court, it would be most unfortunate to distinguish this case on the ground that the label did not comply with the requirements of Section 343 (c) when the correctness of the label was not disputed by the government.

III.

The court erred in overruling the finding of the trial court that "the articles of food seized purport to be and are

represented as imitation fruit preserves and purport to be nothing else and are represented as nothing else." (Finding of Fact 16, R. 23.)

Since this finding of fact was adequately supported by evidence adduced by the trial court, it was conclusive and binding on appeal. The court erred in disregarding this finding of fact. Furthermore, since the product, under the finding of fact of the trial court, did not purport to be standard fruit jam and was not represented to be standard fruit jam, the court erred in considering Section 343 (g) in reaching its conclusion.

IV.

The court erred in failing to consider that for many years the position of the Administrator was that products such as the one seized in the instant case must be marketed as "imitation jam." Trade Correspondence No. 151 issued March 7, 1940 required the marketing of a tomato product that did not meet the standard for Tomato Puree as "Imitation Tomato Puree." Kleinfeld and Dunn, Federal Food, Drug, and Cosmetic Act, Pages 627-628. Similarly the Food and Drug Administrator argued in Land O'Lakes Creameries, Inc. et al vs. McNutt et al, 132 F. 2d 653, 658, that the provision as to standards of identity (Section 341) and the imitation provision [Section 343 (c)] are not conflicting and are independent of one another. Prior to this case, with the exception of one public utterance, the Food and Drug Administrator has sanctioned imitation products such as the ones seized in this case. The court should have given weight to the established regulations of the Administration and its argument in the Land O'Lakes case upon which so many honest businessmen have relied in good faith.

V.

The court erred in suggesting that the product seized could be marketed as "syrup and fruit thickened with pectin or syrup flavored with fruit and thickened with pectin." Although both the majority and dissenting opinions agree

that the product may be marketed in interstate commerce, the labeling suggested by the court would subject the products to immediate seizure as misbranded foods under Section 343 (g).

VI.

The majority opinion has laid much stress on 21 U.S.C.A. 343 (h) (1) (2) in reaching its conclusion that Section 343 (g) does not permit a departure from the standard even though the food is labeled "imitation" in accordance with Section 343 (c). Section 343 (h) (1) (2) read as follows:

"A food shall be deemed to be misbranded—

"(h) If it purports to be or is represented as—

"(1) a food for which a standard of quality has been prescribed by regulations as provided by section 341, and its quality falls below such standard, unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard; or

"(2) a food for which a standard or standards of fill container have been prescribed by regulations as provided by section 341, and it falls below the standard of fill of container applicable thereto, unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard."

It is submitted, however, that the court should not confuse standards of quality and fill of container with standards of identity. If Congress had desired to eliminate imitations from interstate commerce, once standards of identity had been established for the food so imitated, it had clear and unequivocal language in the drug sections of the act to use as a guide. Had Congress desired such a result in the food laws, it would have simply used the words of Section 352 (i) (2) which read as follows:

"A drug or device shall be deemed to be misbranded—

"(i) (2) if it is an imitation of another drug."

In Section 352 (i) (2) there is no qualification or condition for the marketing of drugs dependent upon any manner or method of labeling. If Congress had intended to eliminate the imitation provision of Section 343 once standards of identity had been established for the food imitated, specific statutory language to achieve such a result in clear and unequivocal language was at its command.

VII.

This case was admittedly brought by the Food and Drug Administration as a Test Case to enable the Administrator to obtain a guide or guides from the Court as to the meaning of the imitation section of the 1948 Act, Section 343 (c). It was and is the hope and desire of both the appellee and the appellant that the court give to the food industry and the Federal government an interpretation of Section 343 (c). Instead the court in effect eliminated Section 343 (c) of the act without once mentioning that section in the body of the opinion. Since the case before the court is one of the most important cases brought under the 1938 Act, and since the decision will in effect destroy businesses that have developed under government supervision and control based upon Section 343 (c), the government and those in business who are conscientiously and honestly attempting to adhere to the statutory directives of their government are entitled to know on what grounds and for what reasons, in the face of statutory background of its specific meaning and purpose, Section 343 (c) is by judicial interpretation stricken from the Food, Drug, and Cosmetic Act.

VIII.

The reasoning of the court as to substandard jam is in error. The court on page 5 of its opinion states as follows: "They are a substandard jam. They are not an imitation jam." As the dissenting opinion clearly points out, "imitation" as defined by Webster, means "simulating something superior, especially something more costly." "No other word or combination of words in the English language

could be used which would so well call the attention of the purchasing public to the fact that the labeled food was not a standard product." If the article under seizure labeled "imitation" in conformity with Section 343 (c) is not an imitation jam, what is an "imitation fruit jam"? The statute states in effect that substandard products may be marketed in interstate commerce if they are marked imitation, yet the court takes the position that the product seized is not an imitation product even though it is a substandard jam plainly marked "imitation." The court should clarify its position as to what is an "imitation fruit jam."

IX.

The court erred in considering the evidence that the product under seizure was served by hotel dining rooms, restaurants and other public eating places, and that ranches and logging camps served such jams to their employees as jam. The Act only contemplated the question of whether or not the product is misbranded at the time of its sale to the ultimate purchaser. Whether or not it is desirable to amend the act to insure protection, if any protection is necessary, to the ultimate consumer is immaterial at this juncture. The act was intended only to protect the ultimate purchaser and not the ultimate consumer. The appellee objected to the introduction of evidence as to service in hotels, logging camps, in the trial court (R. 43, 44) and the court erred in giving any consideration to this evidence. This court in U. S. vs. 716 Cases, More or Less, etc., Del Comida [illegible] Tomatoes, 179 F. 2d 174, recognized that the effect of [illegible]'38 Act was to protect the ultimate purchaser as opposed to the ultimate consumer, and the court should have rejected any consideration of the ultimate consumer in rendering its decision in this case.

X.

The court erred in attempting to apply Libby, McNeill and Libby vs. U. S., 148 F. 2d 71; U. S. vs. 716 Cases, More or Less, etc., Del Comida Brand Tomatoes, supra, and Federal Security Administrator vs. Quaker Oats Company, 318

U. S. 218, to the instant case. In none of these cases, was the product seized, labeled "Imitation." In none of these cases was the imitation provision of the Act, Section 343 (c), in any manner whatsoever involved in the decisions. These cases hold simply that once standards of identity have been established, deviations from these standards will not be permitted even though the deviations are truthfully stated on the labels. These cases cannot be cited for the legal proposition before this court, namely can there be imitations of a standard product? If Congress had intended to eliminate imitations it could have used the language of the drug section, Section 352 (i) (2), which reads as follows:

"A drug or device shall be deemed to be misbranded * * * if it is an imitation of another drug."

The intent of Congress, as evidenced by the many hearings and Committee reports, was to sanction imitations of standardized products in interstate commerce if said products conformed with the labeling requirements of Section 343 (c). Congress intended and did create a specific exception to Section 343 (g), and the court is in error in citing the Libby, Quaker Oats, and Del Comida cases as contrary authority.

By virtue of the reasons for rehearing set forth above, we respectfully request that the court reconsider its original opinion herein, and upon rehearing withdraw said opinion and affirm the judgment of the lower court.

Respectfully submitted,

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Denver 2, Colorado,
Attorneys for Claimant-Appellee
Pure Food Manufacturing
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Of Counsel:

Ireland, Ireland, Stapleton and Pryor.

Certificate.

We hereby certify that the foregoing petition for rehearing is not filed for delay, but is filed in good faith in the firm belief that it is meritorious.

CLARENCE L. IRELAND,
BENJAMIN F. STAPLETON, JR.,
802 Midland Savings Building,
Denver 2, Colorado,
Attorneys for Claimant-Appellee

Filed July 15, 1950.

Suggestion for Modification of Opinion.

The Government respectfully requests that the penultimate paragraph of this Court's opinion, which states in part that the "The manufacturer may market the product as syrup and fruit thickened with pectin" or "syrup flavored with fruit and thickened with pectin * * *," be deleted. The reasons for this request are the following.

It is submitted that such paragraph is, in reality, dictum which does not deal with the specific problem before this Court; and that it may be misconstrued so as to support a contention which would place the consumer in a most disadvantageous position, and render null and void one of the most important and salutary provisions inserted in the Federal Food, Drug, and Cosmetic Act for the specific purpose of remedying a serious weakness in the predecessor Food and Drugs Act of 1906. The opinion of the Court in footnote 6, quotes from Senate Report No. 361, 74th Cong., 1st Sess., page 8, which refers to the plain policy of Congress that the operation of 21 U. S. C. 343 (g) shall not interfere in any way with the marketing of "any food which is wholesome but which does not meet the definition and standard," and that "This does not preclude the use of distinctive individual brands." The Committee Report, however, continues by stating specifically that the loophole

afforded the dishonest manufacturer by the so-called "distinctive name" proviso of the Food and Drugs Act of 1906 will be closed.

The Government urges that the Committee report points out most clearly the clear intent of Congress to bar from the channels of interstate commerce a product such as is involved in this case regardless of the name it bears, because it is a substandard illegal product. It seems obvious that the Committee report reveals that the penultimate paragraph of this Court's opinion would be a deviation from the policy of Congress and the clear intent of the statute.

The opinion of the Court, in footnote 3, refers to the opinion in the Bred Spred case (49 F. 2d 887 (C. A. 8)), and to an excerpt from H. R. 2139, 75th Cong., 3d Sess., which discloses the design of Congress to remedy the serious weakness in the Food and Drugs Act of 1906 revealed by that decision. As indicated above, the lack of any provision in the old law which would prevent the marketing of a substandard fruit jam by the use of another name or description was obviously one of the weaknesses in the old law which was sought to be remedied.

The Act is not designed to outlaw a wholesome product which does not meet a definition and standard of identity and which is sold under a distinctive individual brand or name, provided that the product, as specifically pointed out in the Senate Report referred to above, is likewise truly distinctive or proprietary as distinguished from a common article such as jam. The Government has never contended, and does not now contend, that any wholesome food product is barred from the channels of interstate commerce by the Federal Food, Drug, and Cosmetic Act, if it is in fact truly distinctive in content as well as in name. The entire contention is that a product such as appellee's is barred only when it has such potentiality of deception to the ultimate consumer, as when it is a substandard standardized food, as to make it purport to be the standardized food and violate 21 U. S. C. 343 (g).

Take the product involved in this case. True, it is a wholesome product, as was farina with vitamin D, involved in the Quaker Oats case, and as was tomato catsup with preservative, involved in the Libby, McNeill & Libby case. But in those two cases, as well as in the present action, the products were not distinctive products but rather, in reality, the products covered by the respective definitions and standards of identity but made in violation thereof. Thus, in its opinion, this Court refers specifically to the fact that the jams under seizure "are a substandard jam." A substandard jam, of course, purports in every respect to be standardized jam, is not a distinctive or proprietary product, and necessarily has within it the potentiality of deception to the ultimate consumer revealed by the facts in the present case. The ultimate consumer cannot possibly realized that the product which he is consuming is in reality a substandard and not a distinctive product, and a truthful label which may once have been on the container is no protection whatever to him and certainly does not make the product a distinctive one. It is presumably for that reason that Congress, in 21 U. S. C. 343 (g), provided that a food shall be deemed to be misbranded "If it purports to be or is represented as" a standardized food unless it conforms to the standard. A food product which does not bear the name of a standardized food may not be represented as the standardized product; but the name is only one item to be taken into consideration in determining whether the product purports to be the standardized food.

In other words, the Government's position is precisely that pointed out by the Senate Committee on Commerce in Senate Report No. 361, 74th Cong., 1st Sess., referred to above. There is *no* design to outlaw wholesome products which do not purport to be the standardized products and which thus do not possess the inherent potentiality of deception which no labeling can cure. But it is the clear design of the Act to outlaw a product such as that involved in this case, which is clearly not a distinctive product but a substandard standardized product which, as this Court

pointed out in its opinion, was served by hotel dining rooms, restaurants, and other public eating places to their patrons as fruit jam, was advertised by retail grocery stores as fruit jam and was used to fill orders for fruit jam, was served by ranches and logging camps to their employees as fruit jam, etc. Labeling such a substandard and non-distinctive product with a distinctive name such as "syrup and fruit thickened with pectin" or "syrup flavored with fruit and thickened with pectin," would obviously have no effect upon such factual situations.

This construction of 21 U. S. C. 343 (g) is not only entirely consistent with the language and legislative history of the Act but is in accord with the remedial design of the statute to protect the consumer, which has caused the Courts with unanimity to construe it liberally. As stated by the Supreme Court in United States v. Dotterweich, 320 U. S. 277, 280:

> The purposes of this legislation thus touch phases of the lives and health of people, which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words.

We respectfully submit this matter for such consideration as to the Court may seem proper.

JAMES M. MCINERNEY,
Assistant Attorney General.
VINCENT A. KLEINFELD,
JOHN T. GRIGSBY,
Attorneys, Department of Justice.

I certify that in my judgment this petition is well founded and that it is not interposed for delay.

JAMES M. MCINERNEY,
Assistant Attorney General.

Filed July 17, 1950.

Order Denying Petition for Rehearing and Motion to Modify Opinion.

Thirty-Third Day May Term, Saturday, July 22nd, 1950. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Walter A. Huxman and Honorable John C. Pickett, Circuit Judges.

This cause came on to be heard on the petition of appellee for a rehearing herein and the motion of appellant to modify the opinion herein, and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition and motion be and the same are hereby denied.

On August 2, 1950, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court for the District of New Mexico.

Clerk's Certificate.

United States Court of Appeals, Tenth Circuit.

I, Robert B. Cartwright, Clerk of the United States Court of Appeals for the Tenth Circuit, do hereby certify the foregoing as a full, true, and complete copy of the designated transcript of the record from the United States District Court for the District of New Mexico, and full, true, and complete copies of certain pleadings, record entries and proceedings, including the opinion (except full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Court of Appeals for the Tenth Circuit in a certain cause in said United States Court of Appeals, No. 4039, wherein United States of America was appellant, and 62 Cases, more or less, each containing six jars of jam, assorted flavors, net wt. 5 lbs. 2 ozs., shipped

by the Pure Food Manufacturing Company, Denver, Colorado, was appellee, as full, true, and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 16th day of August, A. D. 1950.

(Seal, U. S. Court of Appeals, Tenth Circuit)

ROBERT B. CARTWRIGHT,
Clerk of the United States Court of Appeals, Tenth Circuit.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 363

ORDER ALLOWING CERTIORARI—Filed November 27, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.